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JAMS

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IN RE: FACEBOOK INC., )  
CONSUMER PRIVACY USER )  
PROFILE LITIGATION )  
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HELD VIA ZOOM

REPORTER'S TRANSCRIPT OF PROCEEDINGS:

JAMS Special Master Hearing

Saturday, December 4, 2021

REPORTED BY:

Katy E. Schmidt

RPR, RMR, CRR, CSR 13096

Job No.: 4980290

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JAMS Special Master Hearing on Saturday,  
December 4, 2021, at 9:06 a.m., virtually before Kathryn  
E. Schmidt, RPR, RMR, CRR, CSR 13096.

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LOS ANGELES, CALIFORNIA

FRIDAY, DECEMBER 4, 2021

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SPECIAL MASTER GARRIE: So just for the purpose of the court reporter, just speak at a cadence that she can type against. If the court reporter --

Kathryn, if you need someone to repeat something or say something, please let us know. We will do our best to accommodate accordingly.

With that all said and laid out, is there anything from your end, Kathryn, you need to do?

(Discussion held off the record.)

SPECIAL MASTER GARRIE: All right. So to get this moving along, we're having a hearing today about ADI, just ADI, and the ADI related materials.

We will not go into the litany of other things that have traded in e-mail back and forth over the past couple weeks. This is very focused and very focused on this one issue, which is, I think, fairly large in itself.

So with that said, the first I wanted to do is talk about the parties' interpretation of the scope of Corely's order. And --

But before we get into that, I wanted plaintiffs to state what their position is succinctly,

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1 limited adjectives, if possible or where possible, and  
2 Facebook to state their position as well, and the relief  
3 being sought from both sides.

4 So, Lesley -- or sorry. Counsel Weaver or  
5 Counsel Loeser, who would you -- or anybody from the  
6 plaintiffs' side, who should I direct my questions to  
7 for purposes of this?

8 MS. WEAVER: Derek will be fielding questions.

9 MR. LOESER: Good morning.

10 I'll start, Special Master Garrie, and answer  
11 your questions, and there may be others that have  
12 particular points they want to make based upon your  
13 questions, but I'm certainly happy to start this ball  
14 rolling.

15 SPECIAL MASTER GARRIE: Counsel, we'll hear  
16 from you.

17 And then from Facebook side -- sorry --  
18 Counsel Snyder, Counsel Stein, or anybody -- who should  
19 I direct the Facebook --

20 MR. SNYDER: Me in the first instance, and  
21 then when I need to pass the ball, I will.

22 SPECIAL MASTER GARRIE: Okay. Counsel Loeser,  
23 the floor is yours.

24 MR. LOESER: Thank you. And thank you for  
25 making yourself available today, Special Master Garrie.

1 It's -- we all have other things to do, I'm sure, on  
2 Saturday. My hope is that we can cover the issues we  
3 need to cover and not spend more time than we need to  
4 and just get through this and get to a place where  
5 materials that we think are long overdue are produced.

6 We put together a presentation to walk through  
7 a variety of things. I'm going to jump to one slide and  
8 we'll probably be jumping around a bit just to show you  
9 precisely what it is that we're seeking. So bear with  
10 me for one second while I attempt to use technology.

11 SPECIAL MASTER GARRIE: Can we enter that in,  
12 the presentation, into -- for -- as an exhibit so we  
13 have our...

14 MR. LOESER: Okay. We're going to jump around  
15 here.

16 So your question is what is it exactly that  
17 we're seeking?

18 Here is our position in a nutshell,  
19 Special Master Garrie.

20 There was a couple of years of briefing on the  
21 issue of the ADI. We've been seeking this material for  
22 over two years. There was a lengthy process set up by  
23 Judge Corely resulting in a couple rounds of briefing  
24 and ultimately an order.

25 And that order required Facebook to produce a

1 variety of materials from the ADI. Judge Corely  
2 concluded that the basis for withholding the materials  
3 which was the work product doctrine was not appropriate;  
4 that the dual purpose rule meant that the materials were  
5 not protected by work product.

6 Plaintiffs had also made clear that we were  
7 not seeking attorney-client privileged communications.  
8 We weren't seeking communications to or from the  
9 attorneys. And instead, we were seeking the underlying  
10 factual information and materials relating to the ADI.

11 We won that motion to compel. The order was  
12 issued on September 8th.

13 Facebook has had since then to abide by the  
14 order. The order required production of specific  
15 materials relating to the six exemplar apps and then had  
16 this key language to the parties to work with you as  
17 Special Master to produce other materials consistent  
18 with the guidance.

19 Facebook had essentially ignored that  
20 instruction. Many efforts to meet and confer on this,  
21 many efforts to get Facebook to state a position, all  
22 unsuccessful.

23 So here's where we are today. These are the  
24 specific items we've asked Facebook to produce that are  
25 consistent with Judge Corely's order.



1           They are all memoranda prepared by  
2           [REDACTED] or [REDACTED]; all background  
3           reports, technical reports, audits and developer  
4           interviews; all internal Facebook communications  
5           relating to these first two items; all communications  
6           with [REDACTED] or [REDACTED] related to  
7           items 1 and 2; and all third-party communications  
8           related to ADI.

9           Each one of those is a category of information  
10          that is entirely consistent with the order and should be  
11          produced.

12          Now, Special Master Garrie, if you would like  
13          us to go through and explain precisely why these things  
14          are required, we can do so. But I take your question to  
15          just simply require us to tell you exactly what it is  
16          we're seeking, and this is exactly what we are seeking  
17          and has been what we are -- what we have sought for a  
18          long time now.

19          Last thing I would note for Your Honor is that  
20          as to what's in dispute here, I take from Facebook's  
21          position that it -- in its papers it submitted on  
22          November 4th, they really don't have a dispute as to  
23          the [REDACTED] or [REDACTED] memos. Those are  
24          what they produced for the six exemplar apps. So  
25          obviously they read Judge Corely's order to require the

1 production of those.

2 There's no basis for withholding the rest of  
3 those memos. It's long overdue. You strongly  
4 encouraged Facebook to produce this information or  
5 explain why they would not. They did neither.

6 Now, another month has passed and we still  
7 don't have them. We think it's imperative that there be  
8 immediate order on production of those materials.

9 The other category here where there really  
10 shouldn't be any -- any debate is the issue of  
11 third-party communications related to ADI. And that is  
12 something that Facebook already said that it produced.  
13 When we got the information from the six exemplar apps,  
14 it was clear that it wasn't true. There was  
15 communication in there that was a third-party  
16 communication that had not been produced previously.

17 Facebook has a fairly tortured explanation for  
18 that. And we don't really want to play games on it. We  
19 just want them to do what they said they were going to  
20 do and produce those communications as well.

21 The crux of the debate appears to be whether  
22 we're entitled to internal Facebook communications about  
23 the ADI.

24 Your Honor certainly heard me talk for a long  
25 time about why that material is important. It is

1 important, and it is also entirely consistent with  
2 Judge Corely's order.

3 SPECIAL MASTER GARRIE: Thank you.

4 Counsel Snyder?

5 MR. SNYDER: Yes, Judge. We've also prepared  
6 a presentation that we think will shed light on the  
7 record, including Judge Corely's order.

8 I'll give you the top line, and then -- and  
9 then work through it I think in a way that will be  
10 helpful.

11 MS. KUTSCHER CLARK: Can I ask that plaintiffs  
12 take down their presentation so I can put up our  
13 presentation?

14 SPECIAL MASTER GARRIE: Yeah.

15 Just as a general operating rule, when you're  
16 done presenting, take down whatever you were presenting  
17 so we can see everybody's face until someone else  
18 presents.

19 Sorry for not letting you know.

20 MR. SNYDER: So I'll give you sort of the  
21 bottom line or executive summary, and then we can walk  
22 through it because we have invested significant time to  
23 work through this with Judge Corely over two years.  
24 And plaintiffs want to now start from scratch but  
25 fortunately we have a record and a long history that

1 will I think shed objective light on where we are.

2 Our position, bottom line, and then I'll back  
3 up, is the order is clearly about three buckets or  
4 categories of documents that Judge Corely found to be  
5 relating to the underlying facts, which are not  
6 privileged.

7 Our ask or the relief sought here with the  
8 Special Master process is to enforce the order that  
9 limits discoverable materials to the three buckets.

10 We've abided by that order. A number of the  
11 arguments that counsel just made, they've already  
12 litigated and lost.

13 So let me go to the order. And as you know,  
14 just to set the factual context, this is about an  
15 internal legal investigation that my law firm designed  
16 and led to advise Facebook on risks after  
17 Cambridge Analytica, and 60 lawsuits were filed,  
18 including this one. And so we conducted the app  
19 developer investigation.

20 In November of 2019, this is now two plus  
21 years ago, plaintiffs asked for every single document  
22 that relates in any way, shape, or form to that  
23 investigation. And we have -- one thing I agree with  
24 Derek on is we spent two years working to narrow and  
25 rationalize that request.

1           Their demand for ADI correspondence was  
2           already litigated, and Judge Corely rejected it after an  
3           extensive sampling and logging exercise and in-camera  
4           review.

5           Judge Corely stated multiple times, and  
6           plaintiffs even agree, that the only relevant and  
7           discoverable materials are underlying facts about the  
8           investigation.

9           She also issued an order that, as we all know,  
10          identifies three buckets of documents relating to  
11          underlying factual materials that she found  
12          discoverable. Those are the documents at issue here  
13          today.

14          She didn't order production of a single ADI  
15          document or communication or other materials from our  
16          sample privilege logs.

17          So the three buckets are clearly identified in  
18          Judge Corely's order.

19          One, background and technical reports prepared  
20          by non-attorneys, audits conducted by non-attorneys,  
21          and then interviews conducted by non-attorneys. And we  
22          already produced these materials to the extent they  
23          exist for the six exemplars, as Judge Corely ordered.

24          And the only open issue is whether materials  
25          in these three buckets are discoverable for other apps

1 beyond the six. And if they are, how and when they  
2 should be produced.

3 All the other requests, as I'll walk through  
4 now, have already been rejected but Judge Corely.

5 So if you look at the record, which is -- I  
6 think has to be our north star, we can walk through  
7 briefly the procedural history here. And slide 1, I  
8 said they demanded all documents relating to ADI.

9 Judge Corely ordered a sample logging for six  
10 apps. She conducted in-camera review with extensive  
11 briefing. She expressed skepticism about the relevance  
12 of ADI e-mails, saying only that facts are discoverable.  
13 And then she -- she resolved the ADI motion, ruling that  
14 e-mails are not required to be produced.

15 And let's continue.

16 SPECIAL MASTER GARRIE: Sorry. Before you  
17 go -- what order was -- so there's a couple ADI orders.  
18 There's --

19 MR. SNYDER: Yeah.

20 SPECIAL MASTER GARRIE: -- one on the motion  
21 to compel.

22 So when you say order, which one are you  
23 referring to? Because I did read the -- your filings  
24 and submissions.

25 MR. SNYDER: Sure. The -- the -- the order

1 that -- I'm not sure what the date of the order was. I  
2 know when the hearing was.

3 Martie, do you know the date of the order?

4 MS. KUTSCHER CLARK: Yes. It's the most  
5 recent September order which says that it disposes of  
6 all of the prior ADI motions, including the motions for  
7 communications.

8 MR. SNYDER: Right.

9 So what happened is after we spent months  
10 collecting and logging the ADI communications,  
11 Judge Corely reviewed a sample of those, of plaintiffs  
12 choosing, by the way, and then she told plaintiffs,  
13 quote, "A lot of it I don't think is relevant at all."  
14 And then she said, "Some materials are privileged and I  
15 actually think you don't even need."

16 And this was an important moment in the -- in  
17 this process because after litigating the scope of the  
18 plaintiffs' ADI request for more than a year,  
19 Judge Corely realized that these weren't the types of  
20 materials that contain discoverable facts; that is,  
21 facts concerning app developers. And she asked a bunch  
22 of questions. She said, "What precisely is it that the  
23 plaintiffs need from the investigation?"

24 And they finally acknowledged, Your Honor --  
25 Your Honor -- Mr. Garrie, that what they wanted was the

1 facts underlying these communications.

2 And she did not issue a ruling at that time  
3 but advised the parties, quote, "Facts underlying ADI  
4 may be discoverable but not information that is  
5 attorney-client privilege or attorney work product."

6 So she didn't -- there was no blanket  
7 rejection of the work product doctrine. There was a  
8 recognition that some underlying facts will be  
9 non-privileged, and then things may well be privileged,  
10 will be privileged. And she even said, you know, edits  
11 and any advice that was given.

12 So she finally issued the order at issue  
13 that resolved all of plaintiffs' motions to compel ADI  
14 materials. It was an omnibus final order addressing  
15 and resolving these issues.

16 And so that's very important because there is  
17 no more bite at the apple, unless, you know, they file  
18 a new motion presumably that seeks relief from  
19 Judge Corely's order, which they haven't done. They  
20 just have ignored and are asking you to invalidate her  
21 order without styling it as a motion for reconsideration  
22 or anything of the sort, assuming that will even be  
23 appropriate to do in this proceeding rather than going  
24 directly to Judge Corely.

25 So she didn't order any communications or



1 other materials from our privilege logs produced. I  
2 think that's very important to note. But she made clear  
3 that the plaintiffs were only seeking specific  
4 underlying factual materials prepared by non-attorneys  
5 that does not involve communications with lawyers or  
6 content created by lawyers.

7 And she found that we, Facebook, had met our  
8 burden of proving that the documents were prepared in  
9 anticipation of litigation, but obviously said there  
10 were a dual purpose. So we're not necessarily --  
11 necessarily protected by the work product doctrine.

12 So she ordered three categories of documents  
13 produced on the basis that we've offered no special  
14 reason why those particular documents are privileged.

15 So she said produce these three categories,  
16 but to the extent there is a privilege, attorney-client  
17 or work product, those privileges, if sustainable,  
18 would -- would apply. So there was no blanket ruling  
19 that Facebook doesn't have privilege as to even the  
20 underlying factual material --

21 SPECIAL MASTER GARRIE: This is where I had a  
22 question.

23 So you see where it says "chosen as Facebook  
24 has offered no special reason"?

25 Do you see where it says "no special reason"?

1 MR. SNYDER: Yes.

2 SPECIAL MASTER GARRIE: Is that what -- when  
3 you're making the statement, is that what you're relying  
4 on?

5 MR. SNYDER: Yeah. Well, it's that we had  
6 only given her six sample apps chosen I think by the  
7 plaintiffs, and as to those documents that we gave, she  
8 said we've -- we have no reason why those particular  
9 documents are privileged. So she made that ruling,  
10 which is her right. But she didn't say categorically  
11 that all of our documents within these three buckets  
12 are not privileged because she didn't consider them.

13 In other words, she said the facts are not  
14 privileged but attorney-client work product still  
15 attaches.

16 And you'll see when we talk about the process  
17 going forward, we believe, you know, and I think  
18 Judge Corely's order makes clear, that to the extent  
19 Facebook still has an assertion of privilege over new  
20 documents, those are valid, actionable, and enforceable  
21 under this order.

22 So the three -- there's no disagreement that  
23 background technical reports prepared by nonlawyers,  
24 audits conducted by nonlawyers, and interviews conducted  
25 by nonlawyers, are within -- are within the ambit of

1 what is producible.

2 And Judge Corely directed us to work with  
3 you, Mr. Garrie, obviously regarding any additional  
4 productions but consistent with her order. So --

5 SPECIAL MASTER GARRIE: This is my question:  
6 So I read her order and I -- when you look at page 2 of  
7 the order, I don't know -- sorry for interrupting you --  
8 but if you look at page 2 of the order, on lines 9 to  
9 12, this is where I -- where --

10 Counsel Kutscher, if you could -- Clark, if  
11 you could bring it up by chance, or I can --

12 MS. KUTSCHER CLARK: Yes. If you give me one  
13 second.

14 SPECIAL MASTER GARRIE: And we'll go back to  
15 the presentation.

16 MR. SNYDER: Yeah. And while she's getting  
17 it -- there we go. Good.

18 SPECIAL MASTER GARRIE: If you look at line 9  
19 where it starts with "While Facebook has agreed to  
20 produce some information," and then she cites the  
21 docket, right, and you go look at the docket, "it  
22 refuses on privilege grounds to produce the reports,  
23 audits, and interviews and non-attorney communications  
24 related to the same."

25 She doesn't say that it's to the six; right?

1 She says -- because if you go look at the docket and you  
2 look at it, it doesn't -- it's not -- where do you read  
3 in this -- that it's the six? Because the part -- I  
4 mean, because if you then go through the analysis part,  
5 which is --

6 MR. SNYDER: It would be -- I'll tell you why.  
7 It would be -- it would make a mockery of her order and  
8 two years of work before her if -- to read this order as  
9 saying as to documents she hasn't even reviewed yet,  
10 they're per se not privileged.

11 Because her order says "facts underlying ADI  
12 may be discoverable but not information that is" --

13 SPECIAL MASTER GARRIE: No. I agree.

14 MR. SNYDER: So -- so here she writes  
15 "Facebook shall produce the background technical  
16 reports," dot, dot, dot, "of the six exemplar apps  
17 chosen by the parties, as Facebook has offered no  
18 special reason why those particular documents are  
19 privileged."

20 So inherent or implicit in that --

21 SPECIAL MASTER GARRIE: So you're saying --  
22 so two, then you read in six, and then say you guys are  
23 going to work with me for the rest of them.

24 Is this what you're --

25 MR. SNYDER: Correct. Right.

1           So implicit in this paragraph -- in this  
2           sentence is to the extent documents producible in those  
3           buckets are privileged, then obviously consistent with  
4           the guidance offered by the order, those would not be  
5           producible.

6           And don't get me wrong, we're not looking for  
7           some fig leaf or cover to -- to, you know, redact  
8           everything out on some -- on some bogus --

9           SPECIAL MASTER GARRIE: No. I'm just trying  
10          to understand how you were narrowing -- so that's how  
11          you get that narrowing. Okay.

12          MR. SNYDER: Yeah.

13          SPECIAL MASTER GARRIE: Sorry. You can go  
14          back to your presentation. I'm sorry. I just wanted to  
15          understand that point.

16          MR. SNYDER: Right.

17          So -- so essentially, you know, obviously, you  
18          know, our position was that we should produce nothing.  
19          So to the extent that, you know, I need to make the  
20          record, you know, any production we make will be under  
21          compulsion, and obviously when the United States  
22          Magistrate Judge orders us to produce something, that's  
23          compulsion and we will of course abide by the order and  
24          any -- any following orders that you issue.

25          We think the appropriate approach is that to

1 the extent we are ordered to produce, you know,  
2 additional documents, it should be obviously consistent  
3 with the order, which is in these three categories  
4 documents would be produced, but we would obviously  
5 have the right to assert privilege and redact anything  
6 that is attorney-client privilege or attorney work  
7 product consistent with the guidance.

8 And the language that you referenced also  
9 from the order shows that Judge Corely considered  
10 non-attorney communications but didn't order their  
11 production.

12 So their -- plaintiffs' position that we  
13 should be ordered to produce communications broadly also  
14 runs headlong into and is inconsistent with the order,  
15 and the two years of work before her.

16 If Judge Corely thought communications broadly  
17 defined should be produced, she would have -- since that  
18 was before her, she would have put them in the buckets,  
19 and she didn't. She talked about interviews, reports,  
20 and audits, understanding that communications would be  
21 too broad and, you know, involve, you know, millions  
22 and millions and millions of pages of documents.

23 So the proportionality of this order or the --  
24 to the extent the order seeks proportionality in the  
25 result, it does so by limiting our production to

1 reports, audits, and interviews.

2 And I think we had 6,000 log entries, right,  
3 and not a single document from those were ordered  
4 produced, which I think is -- which is pretty  
5 exceptional, and also I think underscores our good faith  
6 in the process that plaintiffs would have everyone  
7 believe that we're trying to hide the ball. If we were  
8 trying to hide the ball, Judge Corely would have -- you  
9 know, would have seen that and ordered productions  
10 from --

11 And were the productions non-attorney  
12 productions or were they attorney productions, Martie?

13 MS. STEIN: The logs, those 6,000 log entries,  
14 those were non-attorney communications. She --  
15 judge Corely conducted an in-camera review of the  
16 non-attorney communications and did not order a single  
17 non-attorney communication to be produced.

18 And she -- that was one of the -- that was the  
19 big thing that was being resolved in -- and it's one of  
20 the disputes that was resolved by her motion to compel.  
21 It's listed out what it was resolving.

22 And she didn't order, after that extensive --  
23 it took months and months for us to go through this  
24 extensive sampling exercise. We collected and logged  
25 these documents. We briefed them, submitted them for

1 in-camera review, and Judge Corely did not order a  
2 single one of them produced.

3 And that was the -- that was the interim  
4 hearing that Mr. Snyder referenced where Judge Corely  
5 was kind of scratching her head because she had gone  
6 through the in-camera review and didn't understand how  
7 they were relevant. And she thought -- she said, "Some  
8 materials are privileged, and I don't think you need  
9 them."

10 And that was how the whole conversation got  
11 started about, "Well, what do you really need" -- you  
12 know, "What do you really need, Counsel" to plaintiffs?

13 And plaintiffs said they wanted the facts  
14 underlying the communications. That's what they really  
15 wanted.

16 And that brought us to mediation with you  
17 and Judge Andler to talk about what could be done  
18 instead of the communications.

19 SPECIAL MASTER GARRIE: Just before we get  
20 there, so talking about communications, and then Orin --  
21 and then, Derek, I do have some questions for you but --

22 And I do want to let you finish, Orin.

23 But just on that point, Martie, if you could  
24 bring her order back up again, page 2, and look at --

25 MS. KUTSCHER CLARK: I just need one minute to



1 do that.

2 MS. STEIN: As she's doing that, I'd also just  
3 flag that the reason why this whole sampling took place  
4 was because of the extraordinary scope of ADI, all  
5 documents relating to ADI. And Judge Corely recognized  
6 that there were different buckets, different types of  
7 documents. And she wanted us to go through a sampling  
8 exercise so that she could provide guidance on what  
9 types of documents she thought might be subject to  
10 production, both with respect to privilege and work  
11 product, but also with respect to the proportionality  
12 and the needs of the case, which is --

13 SPECIAL MASTER GARRIE: I read all the  
14 briefing and the back and forth. We don't need to  
15 rehash that. And I read all of that.

16 My question is different, which is in her  
17 order, she explicitly says "Plaintiffs seek materials  
18 from the second and third phases that does not involve  
19 communications with lawyers or content created by  
20 lawyers."

21 What it doesn't say in there and where it is  
22 silent, if one were to -- you know, in her -- and  
23 through the order, I don't -- and if you can point me  
24 to where in the order it does provide insight about  
25 internal nonlawyer communications --

1 MR. SNYDER: Yep.

2 SPECIAL MASTER GARRIE: -- where -- because if  
3 you read up above -- but if you just look at those  
4 lines -- or if you want to show me where in that order  
5 it is --

6 MR. SNYDER: Sure. Sure.

7 Yeah. I think all that's doing is stating  
8 the party's position, and it does not reflect even  
9 tangentially, much less directly, the Court's guidance.

10 The Court's guidance is in the three  
11 categories of documents that she said are producible.  
12 And she knew that communications were at play. She knew  
13 that plaintiffs wanted all communications. And had  
14 she -- had she intended her order to direct the  
15 production of communications, it would have said so.  
16 And it expressly -- or it does not order the production  
17 of communications and --

18 SPECIAL MASTER GARRIE: I agree there's no --  
19 that's why we're here; right? There's no explicit  
20 compulsion of the letter.

21 MR. SNYDER: Right.

22 But an order should be written -- I mean, I  
23 can send you the case law, and I don't need to.

24 An order should be read, you know, by its  
25 plain terms. And where -- there's much -- a lot of case

1 law that says "where a party explicitly requests"  
2 something. And in the order, that material is not  
3 ordered produced, that means that it is not subject to  
4 production. Meaning the language you showed us proves  
5 our point. It proves that she considered non-attorney  
6 communications, obviously, because the plaintiffs wanted  
7 them, but did not order them produced.

8 So there's no fair reading of the order other  
9 than that it considered and disposed of the request for  
10 nonlawyer communications --

11 SPECIAL MASTER GARRIE: You then don't read  
12 additional materials consistent with this  
13 guidance because --

14 MR. SNYDER: No. The guidance is three  
15 categories.

16 SPECIAL MASTER GARRIE: I got it.

17 On -- "Facebook shall produce the background  
18 and technical reports, audits" --

19 MR. SNYDER: Yes.

20 SPECIAL MASTER GARRIE: -- "developer  
21 interviews of the six chosen by the parties, as Facebook  
22 has offered why those particular documents are  
23 privileged."

24 MR. SNYDER: Right.

25 SPECIAL MASTER GARRIE: So that's -- okay. I

1 understand.

2 MR. SNYDER: Okay. In other words, the case  
3 law is clear, from the Supreme Court cases on down, that  
4 where an order disposes of an issue and where parties  
5 make arguments for the production of materials or  
6 otherwise, and the order does not address that  
7 particular, you know, request in its directive, it's  
8 considered disposed of and --

9 SPECIAL MASTER GARRIE: We'll entertain that  
10 argument from plaintiffs and from you.

11 I just -- I'm sorry for interrupting you. And  
12 I had questions for plaintiffs, and I held my tongue and  
13 I didn't ask. So I'll hold my tongue and let you finish  
14 your summary. And I apologize.

15 MR. SNYDER: No worries.

16 SPECIAL MASTER GARRIE: Because I do have  
17 questions for plaintiffs as well so --

18 MR. SNYDER: Yeah. I'm winding down.

19 So the bottom line is the judge considered all  
20 the arguments, including plaintiffs' argument for all  
21 communications, rejected some of our arguments, rejected  
22 some of their arguments, and then distilled its guidance  
23 into an order to produce reports, audits, and  
24 interviews.

25 And in the comments she made prior to issuing

1 this order at the -- at the proceeding hearing, she made  
2 clear that she was going to issue an order that was  
3 going to take into account relevance, proportionality,  
4 her in-camera review, and I think what she came up with  
5 was, you know, proportionate because she's not saying,  
6 "Go through millions and millions of documents and find  
7 every memo and communication that was written."

8 If she had intended us to produce non-attorney  
9 communications, she would have said so. She didn't.

10 She said really the opposite, that since facts  
11 are what are at issue, we're just going to order  
12 reports, audits, and interviews.

13 And by the way, that's going to be onerous  
14 enough, as you'll hear, because there's a ton of  
15 material to get through. And then we have to,  
16 consistent with her guidance, review it for privilege.  
17 We can't just turn them over blindly. And so there are  
18 going to be some timing issues around that.

19 And in the event you order us to produce  
20 additional reports, audits, and interviews, you know,  
21 we're going to propose a rolling admission -- rolling  
22 production process because it's going to take a while  
23 for us to get through them. Martie will explain. And  
24 certainly will take longer than our discovery cutoff.

25 So we're going to need to have, if we're

1 ordered to produce more, some leeway on the document  
2 production deadline as it relates to these three  
3 categories of documents.

4 But if you were to order production of all  
5 communications, then it would -- I think respectfully  
6 it will just -- it sort of gut the process that we spent  
7 so long dealing with Judge Corely, I think the role that  
8 should -- this process should play is with these three  
9 categories of documents, that is, reports, audits, and  
10 interviews, what is the most efficient, best process for  
11 us to produce those.

12 SPECIAL MASTER GARRIE: The only other  
13 question and then -- oh, sorry. I'll let you finish and  
14 then --

15 MR. SNYDER: I'm done. I'm done.

16 SPECIAL MASTER GARRIE: My question, and I'll  
17 give plaintiffs a chance -- I have some questions for  
18 plaintiffs, and then plaintiffs will have an opportunity  
19 to respond in kind.

20 But one question is this doesn't change our  
21 obligations under the Federal Rules of Civil Procedure  
22 to produce responsive information; right?

23 So if there are responsive communications to  
24 other discovery requests, this order that we're talking  
25 about isn't going to narrow or remove those obligations

1 to make some reasonable good faith effort. That's not  
2 your position; right? You're still -- it's not being  
3 narrowed to remove that --

4 MR. SNYDER: No, no, no. No. No. In other  
5 words, we believe that if you order us to produce more  
6 documents in these three categories, then -- then  
7 that's -- then I don't think -- other than the  
8 attorney-client and work product objections that we may  
9 have to portions of those documents or maybe the  
10 entirety of one -- I have no idea -- I don't think we  
11 have any other -- other objections.

12 SPECIAL MASTER GARRIE: Here, let me ask my  
13 question.

14 If there's communications between Facebook  
15 and [REDACTED] about -- I mean, I read through your -- it was  
16 a pretty fairly informative briefing, and the  
17 plaintiffs, they included some of these sample reports,  
18 and there's clearly, you know -- well, I don't know  
19 clearly, but it would appear that there was a lot of  
20 work done.

21 MR. SNYDER: Yes.

22 SPECIAL MASTER GARRIE: There was  
23 communication between [REDACTED] examiners -- I'm not sure  
24 who --

25 MR. SNYDER: Yep.

1           SPECIAL MASTER GARRIE: -- and a Facebook  
2     employee that was responsible for [REDACTED]  
3     [REDACTED] whatever.

4           I assume Face- -- somebody at Facebook was  
5     communicating with these people --

6           MR. SNYDER: Yes. Generally -- generally  
7     attorneys were always involved in those communications.

8           But in a hypothetical event --

9           And, Alex, you can address this.

10          In a hypothetical event that John at [REDACTED] sent  
11     a communication or e-mail to Sally at Facebook where an  
12     attorney wasn't copied, that is not within the ambit of  
13     Judge Corely's order. There's no fair reading of that  
14     order that -- it's not a technical report, it's not an  
15     audit, and it's not an interview.

16          And I think the vast majority, if not the  
17     rule, was that attorneys were copied on those  
18     communications.

19          But if one -- if some slip through the cracks,  
20     they wouldn't be privileged -- they wouldn't be  
21     producible because we litigated this issue already in  
22     front of Judge Corely, and she spent all that time  
23     in camera and came out with what she thought was the  
24     proportionate --

25          SPECIAL MASTER GARRIE: I'm not saying that



1 you don't have the -- so, no. My question isn't whether  
2 or not privilege --

3 MR. SNYDER: No. It's not a privilege issue.

4 The only things that Judge Corely ordered  
5 produced are technical reports, audits, and  
6 interviews --

7 SPECIAL MASTER GARRIE: I read the -- I agree.  
8 I understand that.

9 My question is under the Federal Rules, if  
10 there's a responsive thing to another document -- you  
11 guys have a litany of document requests and, I mean -- I  
12 don't even -- can't even --

13 MR. SNYDER: Sure.

14 SPECIAL MASTER GARRIE: -- keep track of them  
15 all unless I use my spreadsheet.

16 If there is responsive communications to --  
17 what I'm basically asking is you have Federal Rules of  
18 Civil Procedure --

19 MR. SNYDER: It supersedes -- yes. This  
20 order -- this order disposes of all ADI document issues.  
21 So that if a document request that seeks some other  
22 category of documents would call for the production of  
23 ADI communications, this order trumps it because the  
24 judge has ruled that this disposes of all plaintiffs'  
25 motions to compel ADI materials. And one of the motions

1 to compel that they filed sought the production of all  
2 communications.

3 So we would -- the plaintiffs could not find  
4 refuge in the Federal Rules of Civil Procedure to obtain  
5 ADI communications that would run afoul of or collide  
6 with Judge Corely's order, which only said three  
7 categories of documents are producible in this case.

8 She didn't say --

9 SPECIAL MASTER GARRIE: I got it. I  
10 understand what you're saying.

11 MR. SNYDER: Yeah. She did not say, "I'm  
12 going to spend hours and hours and you're going to spend  
13 two years litigating this. I'm going to issue a final  
14 order on ADI. And then if plaintiffs issue a new  
15 document request a month later, they can move to compel  
16 ADI materials in connection with that request." Her  
17 intent here was to close the door on ADI.

18 SPECIAL MASTER GARRIE: All right. So that's  
19 your position. I just want to make sure I understood  
20 your full position.

21 MR. SNYDER: And also you should know that  
22 Judge Corely had non-attorney communications with  
23 [REDACTED] before her, during the in-camera review.

24 SPECIAL MASTER GARRIE: Yeah. I read the  
25 brief.

1 MR. LOESER: Special Master Garrie, there's  
2 obviously a lot to respond there.

3 Should I go ahead and start?

4 SPECIAL MASTER GARRIE: Yeah. I mean, can I  
5 ask -- I'll add a question.

6 Yeah. You can respond and then I'll ask my  
7 questions, either/or.

8 MR. LOESER: Yeah.

9 Let me start by something -- you know, I'm  
10 obviously accustomed to spirited litigation and parties  
11 taking positions in litigation that requires some spin  
12 and distortion. But that was a fantastically misleading  
13 presentation. Really stunningly misleading. There --

14 SPECIAL MASTER GARRIE: There were adjectives.  
15 We're trying to limit them.

16 MR. LOESER: Yeah. The order doesn't dispose  
17 of the issue of internal communications. That's just a  
18 fabrication.

19 The order issues guidance. And Facebook is  
20 required to produce the information consistent with the  
21 guidance.

22 The guidance is that these ADI communications  
23 are not privileged. They are not protected. They are  
24 discoverable.

25 And so I would like to walk through our

1 presentation because there's so much that was said that  
2 is wrong that needs to be untangled.

3 And I'm really -- you know, I need to step  
4 back and breathe for a second because it's really  
5 stunning how far we departed from the actual order that  
6 Judge Corely issued.

7 Also stunning how far we departed from what  
8 Judge Corely has said along the process.

9 You know, Facebook has sort of woven together  
10 a series of snippets here and there to come up with  
11 something that's really just a fiction, which is that  
12 the issue of internal communications has been resolved  
13 by the Court. That is fictional. That is nonsense.  
14 And we will go through -- and I think I'll just walk  
15 through the presentation to show you really what  
16 happened because what you heard is so far from actual.

17 SPECIAL MASTER GARRIE: I'm just going to  
18 remind everybody that -- and I appreciate zealous  
19 advocacy just as much as the next person -- to keep  
20 the -- minimize the adjectives.

21 MR. LOESER: I will. But, I mean, I must  
22 confess, I'm just kind of stunned, and so -- but I do  
23 want to walk through and show you --

24 SPECIAL MASTER GARRIE: Do you need to take a  
25 second?

1 MR. LOESER: Yeah. Let's just -- we'll put up  
2 our presentation and --

3 MR. SNYDER: Maybe Derek --

4 MR. LOESER: I don't need --

5 SPECIAL MASTER GARRIE: No, no. We're going  
6 to --

7 THE COURT REPORTER: I'm sorry. I cannot  
8 write everybody at the same time and I'd like to --

9 MR. LOESER: I was just -- Orin, we didn't  
10 interrupt you. Please don't interrupt us.

11 SPECIAL MASTER GARRIE: Everybody, time out.

12 THE COURT REPORTER: Okay. I need to stop.

13 SPECIAL MASTER GARRIE: Thank you,  
14 Court Reporter.

15 So we'll go off the record for 30 seconds.

16 (Discussion held off the record.)

17 SPECIAL MASTER GARRIE: We're going to go back  
18 on the record.

19 And then if people do need to take a moment,  
20 which I fully get and appreciate, there's no issue here.  
21 And if we need to set up a separate room for parties to  
22 go into to caucus or whatever, we can also set that -- I  
23 can set that up as well.

24 So with that said, Court Reporter, back on the  
25 record.

1           And, Derek, if you need a minute, we can take  
2           a minute.

3           MR. LOESER: No. I'm fine.

4           It's just, Your Honor, we've been doing this  
5           for a long time and it's time to just start, like,  
6           accurately reporting the record. And so that's what I'm  
7           going to do here.

8           I put up a slide that just shows you the  
9           sequence of events, some of which you heard from today.  
10          I won't dwell on this slide, but I think it's important  
11          to show this process that occurred.

12          And, you know, we requested these documents.  
13          There was this episode with the log. We'll get into  
14          actually what happened with that log, and how this  
15          notion that that log disposed of internal communications  
16          is just wrong.

17          And we go through this long period of time  
18          that includes Your Honor strongly encouraging Facebook  
19          to produce what obviously should be produced and brings  
20          us to today.

21          So, you know, Judge Corely's order, it  
22          probably goes without saying at this point, but she did  
23          conclude the information the ADI uncovered is directly  
24          related to plaintiffs' claims in the MDL action.

25          You know, truer words were never spoken.

1           The ADI investigation was the investigation  
2           that resulted from Cambridge Analytica.

3           The investigation, the materials, the  
4           communications with third parties, the internal  
5           communications, those are -- that just goes to the heart  
6           of this case. That's why we have fought so long and  
7           hard to get the information because it's hard to think  
8           of anything more central that is fair.

9           So what happened, what actually happened in  
10          the ADI order as opposed to what did you just hear  
11          happened?

12          What happened is the Court rejected any  
13          objections to producing ADI materials based on work  
14          product. And as the Court said, as a general matter,  
15          documents generated as a part of that investigation  
16          were not created because of litigation.

17          Now, you have to remember, Facebook took the  
18          position nothing in ADI was discoverable. It imposed a  
19          categorical privilege on anything, and they lost that  
20          argument because it's just wrong. It's not consistent  
21          with the law, and in particular the dual purpose  
22          doctrine.

23          The order ordered Facebook to produce  
24          materials from the exemplar apps because, quote,  
25          "Facebook has offered no special reasons why those

1 particular documents are privileged other than what has  
2 been addressed."

3 Your Honor identified that same language that  
4 obviously is critical language in the order which is the  
5 culmination of all of this fighting and effort and  
6 briefing.

7 And then this language that Facebook seems  
8 to think doesn't really mean anything is the order  
9 contemplated production of additional materials  
10 consistent with the guidance offered by the order.

11 Now, one of the things that Judge Corely  
12 struggled with through the whole process is how does she  
13 adjudicate this issue with exemplars or with samples or  
14 with logs and have that applied to the rest of the case?

15 And the answer was this language. She went  
16 through a detailed analysis in her order. She discussed  
17 the law. She discussed the facts. She discussed what  
18 ADI was. And she made a number of statements about why  
19 it was discoverable. And then she has this language  
20 that requires Facebook to do something and to do  
21 something in good faith. And that is to produce the  
22 other materials consistent with the guidance offered by  
23 the order.

24 So you heard a lot about what we did seek,  
25 what we didn't seek, and that was pretty distorted as



1 well. Here's what we sought:

2 We sought plaintiffs' seek information learned  
3 from and generated by the ADI.

4 And then she refers to -- we had discussed  
5 these documents in phases. "Plaintiffs seek material  
6 from the second and third phases of the ADI, and does  
7 not involve communications with lawyers or content  
8 created by lawyers."

9 So the second and third phases were when we  
10 didn't want everything from every app that interacted  
11 with Facebook. We wanted the information where  
12 Facebook, through this ADI, identified apps or enhanced  
13 investigation and enforcement. That's what we were  
14 focused on. That was a way of culling the documents  
15 down to only those that seemed most particularly  
16 relevant to our case, which were the ones where they  
17 had themselves identified them as being problematic.

18 The Court also made clear, and we made clear  
19 repeatedly, plaintiffs are not seeking documents created  
20 by counsel, counsel's edits, or any communications with  
21 counsel.

22 And, again, language that Your Honor pointed  
23 out, what Facebook refused to produce, and as the Court  
24 said, "While Facebook has agreed to produce some  
25 information, it refuses on privilege grounds to produce

1 the reports, audits, and interviews and non-attorney  
2 communications related to the same."

3 So, again, they were essentially applying the  
4 categorical privilege with one exception, which was that  
5 they said, but then really didn't complete, the  
6 production of all communications with these third  
7 parties.

8 So I already -- we started with this because  
9 this was your first question, and, again, I won't go  
10 through it again, but these are the materials --

11 SPECIAL MASTER GARRIE: I have a question  
12 about this.

13 If you look at your plaintiffs' response, I  
14 don't know what -- that was filed -- plaintiffs'  
15 response to Facebook's supplemental submission regarding  
16 ADI, and if you turn to page 146 -- can you bring that  
17 up or someone on your team?

18 MR. LOESER: Page 146?

19 SPECIAL MASTER GARRIE: Yeah.

20 Sorry for interrupting. The question I had --

21 MR. LOESER: Just one second.

22 We're searching for that document. I'll pull  
23 it up.

24 If you want to ask your question --

25 SPECIAL MASTER GARRIE: There's language --

1 I read through these sample reports, and there's a  
2 paragraph that starts with [REDACTED] I just want  
3 to understand the substantive, like -- I work better in  
4 the context of actual details. And in it your  
5 request -- so it says [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 So that's my -- well, when you get it up, I  
12 have a series of questions about -- so you -- about the  
13 information that you believe is associated with this,  
14 your request or your five things; right?

15 MR. LOESER: Yeah. I can't -- I don't have it  
16 in a format I can -- oh, there we go. Yeah. We're just  
17 bringing it up now.

18 SPECIAL MASTER GARRIE: Perfect. If you could  
19 just zoom in so -- I don't know if people have bad eyes  
20 like me, but -- all right.

21 So you see where it says [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 Do you see that sentence?

2 MR. LOESER: Yes.

3 SPECIAL MASTER GARRIE: Are you looking for  
4 how they knew that information -- when you say "the  
5 underlying information," are you looking for what infor-  
6 -- is this the [REDACTED] Are you looking for the information  
7 that was provided to make these conclusions?

8 Because then it goes on to say -- is that what  
9 you're getting at?

10 Because then it says, [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 Then it, like -- so they got data from  
14 somewhere; right?

15 And then it says, [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 So are you looking for the technical  
21 analysis -- [REDACTED]  
22 [REDACTED]

23 Like what I'm a little confused -- I'm just  
24 looking for tangible examples of when you say  
25 "associated communications and documents"; right?

1           Somebody had to give [REDACTED] the information for  
2           [REDACTED] to then do the analysis, to then provide this  
3           report with [REDACTED]  
4           [REDACTED]

5           And my question is: Is that the information  
6           you're seeking?

7           MR. KO: I can try to respond to this,  
8           Special Master Garrie.

9           So the first thing that is clear, to give you  
10          a tangible example of what we want, this is a  
11          [REDACTED] memo itself; right?

12          So the first category of documents we seek are  
13          all memos created by [REDACTED] and [REDACTED] which were  
14          the two external consultants that Facebook retained for  
15          purposes of the ADI.

16          The passage that you're reading, you know,  
17          quite candidly shows the relevance of all these  
18          memorandum. And so we're entitled to that in the first  
19          instance. So that's the first tranche of an actual  
20          category.

21          As far as your question about what it is  
22          related to that passage, the communications regarding --  
23          between Facebook, for example, engineers and the  
24          consultants at [REDACTED] about this conclusion  
25          are certainly relevant.

1           And to give you some context for that -- and  
2       this response is something that Mr. Snyder said in his  
3       presentation when he said that out of the -- like we  
4       have a very limited window, obviously, and knowledge  
5       about any of this; right? We have some privilege  
6       logs -- we didn't look at any of the underlying  
7       document. We have privilege logs that identified what  
8       these communications were according to Facebook.

9           And based on those exemplar privilege logs, of  
10      which there were about 6,000 entries, as far as we can  
11      tell, there was a substantial amount of communications  
12      just like the type that you had described; right?

13           Communications from Facebook data engineer A  
14      to [REDACTED] individual B, where -- we of course  
15      don't know what it says. But based on our count, we  
16      have seen that there are probably about 10 percent of  
17      those entries in that privilege log consist of those  
18      communications that you identified and Orin talked  
19      about. And Orin said that he believes all of them were  
20      attorney communications. That's just simply not  
21      correct. There was a bevy of communications involved --

22           SPECIAL MASTER GARRIE: I get -- before we get  
23      to who's right and who's wrong, I'm just trying to  
24      understand what's being sought.

25           So my question is the communications sought by

1 plaintiffs are those types of -- because if you go back  
2 to Derek's presentation, right, there's these five  
3 buckets. One, two, and then the other pieces relating  
4 to them.

5 What I'm trying to understand in a tangible  
6 way is what exactly -- like when you do an investigation  
7 like this, it's a very complicated process, and lawyers  
8 are very involved in parts of this; right? And then the  
9 engineers may be going back and forth or whatever.

10 I'm just trying to understand where it says  
11 "All internal" -- and then it says "All communications  
12 with [REDACTED] or [REDACTED] relating to 1  
13 and 2."

14 So I just gave you an example of a memo that  
15 [REDACTED] wrote based on data Facebook provided to them.  
16 And when you say "all communications," are you looking  
17 from the communications from the Facebook engineering  
18 team to the [REDACTED] team that underlie the basis  
19 for the report?

20 I'm trying to understand --

21 MS. WEAVER: If I may really quickly -- I'd  
22 like to just address this really quickly. This is  
23 Lesley.

24 I agree -- and we're looking at the page  
25 that -- you're thinking of the page that we just had up



1 for you, we view this the way that you look at work  
2 papers in an audit report. What formed the basis of  
3 their conclusions?

4 And when you look at those requests for logs  
5 and it -- and they conclude they can't determine what  
6 data was taken, we need -- we want to know what data was  
7 made available to the third parties in the call logs.  
8 So we need to get to the documents underlying their  
9 conclusions, just like a work paper.

10 Sorry, David. Go ahead.

11 MR. KO: Yeah. No. I think that's exactly  
12 right. And I think it's perfectly encapsulated in our  
13 Category 3 when we say -- we didn't say all  
14 communications period. We said "All communications  
15 relating to categories 1 and 2."

16 And so the example -- I mean, you provided the  
17 perfect example, Special Master Garrie. I mean, the  
18 communication from Facebook data engineer -- I keep  
19 saying it because it's a good example. The  
20 communication from Facebook data engineer A,  
21 communicating about the memo that they are preparing  
22 and creating that we saw the culmination of is -- and  
23 that communication going to [REDACTED] employee B, is  
24 absolutely relevant and related to that memorandum.

25 So we're only seeking the communications



1 related to the memorandum, or in category 2, the  
2 communications related to the background technical and  
3 audit reports that were prepared in connection with that  
4 app.

5 SPECIAL MASTER GARRIE: If you look above on  
6 page 146, if you look above this -- the paragraph above  
7 that, that's the second group.

8 But that's fine. I understand now the  
9 clarity.

10 All right. Go ahead, Counsel Loeser. I  
11 apologize.

12 MR. LOESER: Yeah. I do want to make sure I  
13 respond to Orin's arguments.

14 One thing that he said that is easy to respond  
15 to, there was some reference to these communications and  
16 Mr. Snyder suggested that, you know, they always cc'd a  
17 lawyer on the communication.

18 Obviously, you know, that's a -- something the  
19 Courts have long ago rejected. You can't just cc a  
20 lawyer on something and then it miraculously becomes  
21 undiscoverable.

22 If the communication is a factual  
23 communication, it's not privileged whether it's cc'd to  
24 a lawyer or not.

25 So that's just -- you know, that's just black

1 letter law. So just to be clear on that.

2 But I want to get back into this notion of  
3 these internal communications and what the order did or  
4 did not say about internal communications.

5 There's not one word in the order that you  
6 will find that says internal communications about the  
7 ADI are not discoverable. That's just not true.

8 And really when you think about what these  
9 communications are, I want to come back to how critical  
10 they really are and what the order did say. And what it  
11 said is that as a general matter, documents generated as  
12 part of that investigation were not created because of  
13 litigation. That's true for internal communications as  
14 well.

15 And the order indicated it encompassed all  
16 materials regardless of form that are not created by  
17 counsel, counsel edits, or any communications with  
18 counsel.

19 And so obviously the internal communications  
20 that are not with counsel, whether they to put a cc to  
21 lawyers or not, if they're factual in nature, then they  
22 are discoverable and they're consistent with the  
23 guidance of this order.

24 And just, again, to make clear, the  
25 communications were after. These are not privileged

1 communications. They're not between lawyers. We've  
2 said to Judge Corely and we've said to you, we don't  
3 want those communications.

4 We want the factual information relating to  
5 the ADI, and that obviously includes these internal  
6 communications.

7 And this is a point worth making as well,  
8 which are these communications, quote, unquote, facts?

9 And in Facebook's materials, they've suggested  
10 there's some contradiction between plaintiffs' request  
11 for the underlying facts of the ADI and the request for  
12 both the internal communications and the communications  
13 with third parties.

14 And, you know, obviously there's not.  
15 Communications often relate to or reflect underlying  
16 facts. Communications can also reflect facts about  
17 knowledge and state of mind.

18 And as everybody knows who's involved in  
19 litigation in the modern era, internal communications,  
20 typically in e-mail, though, now in Slack and in chats,  
21 are often the strongest evidence in a case and can be  
22 ripe with admissions. That's why they're discoverable.  
23 That's why we want them. And that's why Facebook  
24 doesn't want to provide them.

25 Now, I do think it's important to go through

1 this issue with the logging of the call logs, and what  
2 happened with the call logs.

3 And Facebook has this idea that because there  
4 was a dispute over the logs and that dispute rolled into  
5 the eventual order, that this means that all internal  
6 communications somehow were ruled out.

7 And that really distorts the process, so I  
8 think it's important to step back and walk through the  
9 process.

10 And so here's what really happened:

11 In June 2020, plaintiffs requested a briefing  
12 process on the motion to compel. And then in August of  
13 2020, Judge Corely requested that Facebook -- requested  
14 Facebook to provide a privilege log of ADI materials.

15 The logs were provided.

16 And then plaintiffs were asked to pick frankly  
17 from the log -- obviously, we didn't know the content of  
18 any of these documents. We just chose as best we could  
19 from the log and we chose 20 documents.

20 And then Judge Corely performed an in-camera  
21 review and provided her tentative view on ADI in a  
22 hearing in April 2020.

23 So what really happened in April 2020,  
24 Judge Corely signaled that she would rule against  
25 Facebook on work product, and here's what she said, but

1 in terms of the ADI team, at least from what I've seen,  
2 it looks like a lot of that was just generated there  
3 separate that may have been reviewed but would have been  
4 done anyway. That's the heart of the dual purpose  
5 determination.

6 And then with regard to these 20 documents,  
7 you know, Facebook has sort of come up with a story  
8 about what happened with the 20 documents and what it  
9 really showed, but there is in fact a record and it is  
10 in fact clear what happened.

11 So in the hearing we had in which she  
12 discussed the 20 documents, she determined, quote, "A  
13 lot of it I don't think is relevant at all." For  
14 example, she said, "So you don't need to know -- you  
15 don't need to know like when a request for information  
16 was sent," and that plaintiffs wouldn't need those  
17 e-mails about "Are you available for this meeting" or  
18 "Can we move it?" "Should you change the weekly  
19 report?"

20 So basically we picked these 20 documents from  
21 a log. We didn't know what was the content of the  
22 documents. They were reviewed in camera. And a lot of  
23 the documents were irrelevant because they were just the  
24 kind of scheduling back and forth for meetings and the  
25 like that it wasn't helpful.

1           And Judge Corely identified that, and made  
2     the point -- she wasn't making some assessment of the  
3     underlying factual communications. She was making an  
4     assessment of the log that seemed to have a bunch of  
5     stuff that just didn't matter because it wasn't  
6     substantive at all.

7           So then Judge Corely ordered the parties to  
8     meet and confer to see if they could agree on a  
9     production. And she allowed additional briefing, which  
10    was submitted.

11          And Judge Corely issued an order allowing  
12    further briefing from Facebook. In that order she  
13    reiterated her view that much of the ADI documentation  
14    is discoverable. "While outside counsel's edits and  
15    advice might not be discoverable, the underlying facts  
16    are discoverable since Facebook would have conducted the  
17    investigation, regardless of any potential legal  
18    liability."

19          And here's where we get -- and I apologize for  
20    sort of walking through this as slowly as I am but it's  
21    important to unwind all of the ways that these events  
22    have been distorted to come to this conclusion that  
23    somehow she ruled on and ruled out internal  
24    communications.

25          So she says, "In particular plaintiffs seek

1 documents not created by lawyers from the enhanced  
2 examination phase that involve background and technical  
3 investigations to identify the potential for data  
4 misuse.

5 "They also seek documents from the enforcement  
6 phase, including Facebook conducted audits and  
7 interviews.

8 "As the Court understands, Facebook has not  
9 offered to produce any of this information. None of  
10 these documents were part of the in-camera review the  
11 Court earlier conducted."

12 That is a critical acknowledgment that really  
13 puts into perspective what this call log process was and  
14 what it revealed. It was a bunch of stuff that just  
15 didn't matter that much because it wasn't substantive,  
16 and the Court noted that.

17 SPECIAL MASTER GARRIE: Just one quick  
18 question. Sorry. Just a quick question.

19 MR. LOESER: Yeah.

20 SPECIAL MASTER GARRIE: In her order, I don't  
21 know if it's document 736, it says -- and I did read  
22 these orders. It says "This order disposes of" -- if  
23 you go back a slide -- "of docket No. 611, 612, and  
24 699."

25 And if you look, you're saying 699 at 5. How

1 does this order impact that?

2 MR. LOESER: And by "this order," you're  
3 talking about the September 8th order?

4 SPECIAL MASTER GARRIE: Yeah. September 8th  
5 order, yeah.

6 MR. LOESER: Yeah.

7 What Judge Corely -- the impact of the -- you  
8 know, the call log phase was an effort for the Court to  
9 understand what was in the -- in these log materials to  
10 come to some conclusion as to the substance of what the  
11 plaintiffs were seeking, factual information. It just  
12 wasn't helpful for that because there really wasn't  
13 substantive communication reflected in most of the  
14 materials that were logged.

15 So it didn't in the end really have anything  
16 to do with what was ultimately ordered by the Court, in  
17 which she did assess substantive factual issues.

18 MR. KO: And I think just to add on that,  
19 Special Master Garrie, I think it's really simple what  
20 she meant by that. She just -- as is evident from the  
21 parties back and forth throughout this entire morning,  
22 there were many disputes that were created, litigated,  
23 and argued before Judge Corely throughout the past two  
24 years. We started arguing this in May of 2020.

25 So all she was doing was saying, look, there's



1 all these outstanding motions, all these outstanding  
2 arguments, this order was to govern and this order was  
3 to be the operative order in which the guidance she was  
4 offering was the basis for the parties to work on in  
5 terms of what additional documents to produce.

6 Because all the prior orders -- she basically  
7 kept saying, like -- and this is really relevant to what  
8 Derek was saying and really relevant to this process of  
9 the exemplar apps of which Facebook keeps saying, you  
10 know, she completely resolved it and nothing in these  
11 apps -- or nothing in these privilege logs should be  
12 produced.

13 We went through those processes and she found  
14 that they weren't helpful to resolving the issue; right?

15 That's why she ordered us to continue  
16 conferring and ordered us to continue briefing the issue  
17 because we couldn't come to an agreement as to what  
18 documents should be produced.

19 And so her final attempt to give us the  
20 guidance was the September order.

21 And so, again, to answer your question, what  
22 she's doing is she's just simply disposing of all the  
23 prior orders, outstanding arguments and pending  
24 arguments before her.

25 MR. LOESER: Yeah. If we look at the next

1 slide, I think this really kind of gets to the heart or  
2 your question, Special Master Garrie, and really gets to  
3 the heart of Facebook's argument.

4 And Facebook takes this line from the order  
5 and the line -- and what Facebook said in its submission  
6 was the parties already litigated whether e-mails and  
7 attachments Facebook logged previously were  
8 discoverable.

9 "Judge Corely conducted an in-camera review  
10 and Judge Corely did not order a single one of those  
11 communications produced."

12 Now, what this sentence really refers to are  
13 the 20 e-mails that she reviewed in camera. Not every  
14 e-mail and attachment that Facebook logged in the  
15 exemplar stage.

16 And, in fact, Judge Corely did not find that  
17 logging exercise to be useful. It did not result in a  
18 resolution of the parties' dispute, which was  
19 plaintiffs' effort to discover the factual information  
20 relating to the ADI.

21 And Facebook is trying to take that and  
22 generalize and say, "Oh, she used those exemplars to  
23 come to a conclusion that none of this is discoverable."

24 And that's just not -- that's just so  
25 inaccurate.

1           If you go back and consider what she said  
2     about the materials that she reviewed in camera, those  
3     were the materials that are largely about scheduling  
4     meetings and whether meetings can be moved and the like.  
5     They are -- they were not substantive materials from  
6     which she was able to conclude and determine what should  
7     happen with the factual information plaintiffs were  
8     seeking.

9           And so as Mr. Ko just noted, she then moved on  
10    to the briefing that resulted in the September 8th order  
11    in which she did provide guidance on what the parties  
12    should do.

13          And so this idea that this logging exercise  
14    somehow resulted in a determination in the September 8th  
15    order that you don't get internal communications, it's  
16    just -- has nothing to do with what was actually learned  
17    from the logging exercise or the role the logging  
18    exercise ever played in resolving the ADI issues.

19          It's the September 8th order that resolves  
20    those issues. And it's the guidance that's provided in  
21    the order that applies to whether internal  
22    communications are discoverable.

23          And, you know, Facebook can say over and over  
24    again this issue was litigated and resolved by the  
25    order.

1           The order does not -- there's nothing --  
2       there's not a word in the order that says plaintiffs are  
3       not entitled to these internal communications. And  
4       there's nothing that happened with the 20 document  
5       logging exercise from which any conclusion can be drawn  
6       about these internal communications because that's  
7       really not what the Court was able to perceive from the  
8       communications.

9           SPECIAL MASTER GARRIE: Let me -- let me talk  
10       about these exemplar productions, and then we can --  
11       we'll continue forward.

12           One question I want to understand, I guess  
13       this is for Facebook as well as you, if you look at the  
14       pages you were just showing me, that I pointed out on  
15       page 140, whatever it is, if you turn to page 132,  
16       like -- there's way more -- as I understand this, this  
17       report covers way more than six apps. It covers all the  
18       apps, [REDACTED] which was identified by, at least  
19       according to this report, that was flagged on 137 --

20           If you go to page 137, if you load that back  
21       up, Counsel Ko, by chance, or whoever loaded it.

22           MR. KO: Yeah. I can share it. I have it up.

23           SPECIAL MASTER GARRIE: I just want to  
24       understand when we're saying exemplars, like this covers  
25       the production by Facebook for the six exemplar apps was

1 for -- I don't to get it wrong, but if you go down to  
2 page 137.

3 That was the right document. You've just  
4 gotta go to 137.

5 MR. KO: Yeah.

6 SPECIAL MASTER GARRIE: Right there. On

7 [REDACTED] just zoom in for the -- yeah.

8 Further. Further.

9 All right. So this -- it says -- all right.

10 So it says [REDACTED]  
11 [REDACTED]  
12 [REDACTED] blah, blah,  
13 blah, [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17 Then it goes on as saying they [REDACTED]  
18 [REDACTED] et cetera, et cetera.

19 And then if you scroll down -- or scroll back  
20 up to on page 132, I guess. Yeah. 132. It starts 133,  
21 I guess. And you see 133, it says [REDACTED]  
22 [REDACTED]

23 Am I wrong here, Counsel, from Facebook?

24 MR. KO: Yeah. That's correct. I can  
25 probably answer that, Special Master.

1           So the exemplar process was one in which we  
2           selected with Facebook six app developers, many of which  
3           developed and created more -- of course more than one  
4           app.

5           And so this memorandum is about [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]

11           MS. STEIN: Just a correction there. That's  
12           not accurate.

13           There was a sampling of six apps.

14           I think what Mr. Ko is saying is that for some  
15           of the apps, the developer at issue had more than one  
16           app, and so that may be why [REDACTED]

17           [REDACTED] But the exercise --

18           SPECIAL MASTER GARRIE: That was my question.

19           MS. STEIN: -- was only for six apps.

20           SPECIAL MASTER GARRIE: Yeah. So let Facebook  
21           answer this.

22           The production that was made was focused on  
23           the six exemplar apps?

24           MS. STEIN: Correct.

25           SPECIAL MASTER GARRIE: Not the, like --

1 because when you add them all up, you blow way through  
2 six and then you get into many more.

3 But your intention at Facebook was just the  
4 six. And the reason I ask, because of your prior -- and  
5 I'm going to return back to Derek so he can finish his  
6 point.

7 I just want to make sure I understood this  
8 because when I read through it, right, there's a whole  
9 lot of conversation about, you know, each of these, they  
10 cover the -- you know, [REDACTED]

11 [REDACTED] But your focus was only for  
12 the six apps.

13 MS. STEIN: That was what the order was for,  
14 was for the six apps sampled. So that was what we did.

15 MS. KUTSCHER CLARK: Right.

16 And in order to produce the reports for the  
17 six apps, [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 SPECIAL MASTER GARRIE: All right. Go ahead,  
22 Counsel Loeser.

23 Thank you, Facebook.

24 MR. LOESER: Just a few more minutes,  
25 Your Honor, to really kind of come back to what really



1 seems to matter here.

2 I mean, again, context, these other memos that  
3 [REDACTED] and [REDACTED] created, obviously their production is  
4 consistent with the Court's guidance, and I really don't  
5 see that there's much dispute about that.

6 And as you heard from the parties'  
7 presentations, this issue of internal communications is  
8 obviously critical. There is no litigation that happens  
9 in which the key evidence in the case doesn't come from  
10 internal communications about the subject matter of the  
11 litigation.

12 And if Judge Corely had wanted to rule that  
13 information out, you would see an order that actually  
14 rules it out, and you don't.

15 But I do want to show you why we are as hung  
16 up on this as we are. And it has to do -- Your Honor  
17 looked at one of the other memos, and we'll just draw  
18 your attention to this [REDACTED] memo.  
19 This is the [REDACTED]

20 SPECIAL MASTER GARRIE: I can't see your full  
21 screen.

22 MR. LOESER: What's that?

23 MS. WEAVER: Can you change the viewer so that  
24 the full -- we only see half of the presentation right  
25 now, the way that it's being shared.



1 MR. LOESER: Can you see the -- is that there  
2 now?

3 Okay. So here's this [REDACTED]  
4 which has a lot of significance to us, particularly  
5 given the DTPA claim and the issues around communicating  
6 videos and sharing what people are watching  
7 inappropriately.

8 This was a -- a -- obviously really  
9 problematic use of user data and friends' data, and  
10 here's the explanation in the memo. [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15 So obviously a critical issue in this case.

16 And here's what the professionals that  
17 Facebook hired had to say about that.

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

24 And also indicates [REDACTED]  
25 [REDACTED]

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[REDACTED]

And then here's another example from [REDACTED]

[REDACTED]

[REDACTED]

And under the [REDACTED]

[REDACTED] it states [REDACTED]  
[REDACTED]

So obviously a hotly contested issue in this case is whether the information shared is sensitive or highly sensitive.

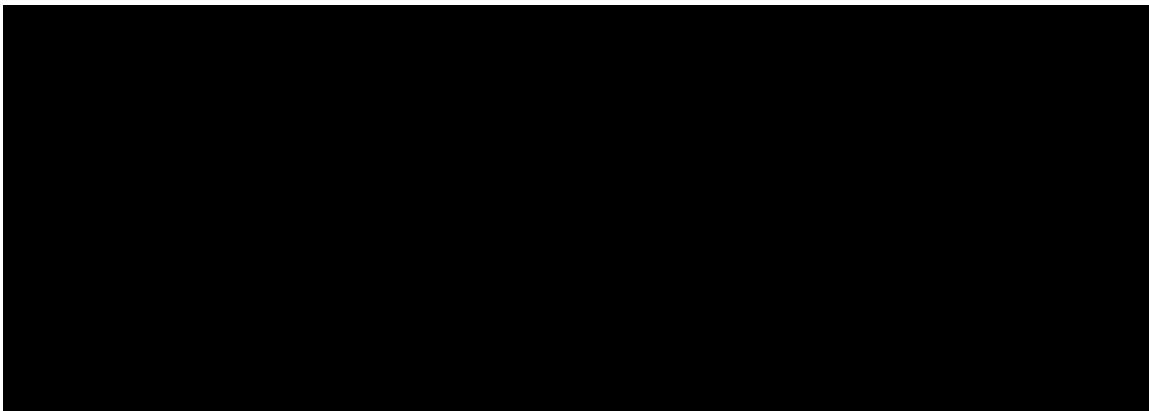
Here you have a memo in which the professionals hired by Facebook and Facebook identify and indicate that [REDACTED]

[REDACTED]

So normal course of litigation, obviously we would want to know, well, what did Facebook think about that?

The [REDACTED] reports revealed that the [REDACTED]

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And here's what we don't know.

How did Facebook respond internally? What did DevOps at Facebook say about the abuses uncovered by the ADI? What did engineering have to say about it? What did they do about it?

We don't know any of that because Facebook has withheld these critical communications.

That's why we're fighting about this,  
Your Honor.

The guidance from the order makes clear that there's not a work product protection for these communications, and there's not an attorney-client protection because these are not attorney -- we aren't even asking for the attorney-client communications. We just want the factual discussion internal to Facebook. And it is critical --

SPECIAL MASTER GARRIE: Can I ask a question?

MR. LOESER: Yes.

SPECIAL MASTER GARRIE: Let me ask a

1 hypothetical.

2 If Facebook got the report from  
3 [REDACTED], and then they read it and then they  
4 then make a decision, you know, "Oh, we need" -- this is  
5 horrif-" -- whatever. Okay?

6 Some internal conversation happens.  
7 Facebook's counsel's on those communications helping  
8 direct that engineering team to figure out what is the  
9 appropriate response.

10 You're not seeking those communications, or  
11 are you seeking those?

12 MR. LOESER: We are not seeking communications  
13 that relate to the underlying facts. So if there's a  
14 communication among engineers that a Facebook lawyer  
15 happens to be on but is a factual conversation, what are  
16 you going to do -- what does this mean that they were  
17 sharing this information? Who actually got it? What  
18 did the API call log show? How did this happen? Why  
19 didn't you stop this earlier?

20 All the things that DevOps, the internal group  
21 of Facebook that was supposed to be managing this  
22 process, the other purpose, the non-litigation purpose,  
23 any factual communication about that is discoverable,  
24 whether they went through the -- you know, the exercise  
25 that the Courts have rejected time and time again of

1 cc'ing a lawyer on it doesn't matter.

2 What matters is the character of the  
3 information being communicated. If it's factual, it's  
4 discoverable. If it's legal advice, it's not  
5 discoverable, and we aren't even seeking it. You know,  
6 maybe we could, but we are not. We are limited to the  
7 facts.

8 And to say that these internal communications  
9 aren't facts, I mean, that really doesn't pass the smell  
10 test.

11 Of course internal communications relate to  
12 facts. They're internal communications about the facts.  
13 That's what we want. We don't want the internal  
14 communications about the lawyer's advice and we're not  
15 seeking that.

16 MR. SNYDER: Would it be helpful if I -- if we  
17 responded briefly?

18 MR. LOESER: I have just one more -- one more  
19 thing I want to do here because I think it may help wrap  
20 this up, frankly.

21 And -- and that's just -- I'll stop trying to  
22 screen share because it's not working.

23 But the question is what do we do now? How do  
24 we move forward? We've been trying to do this for two  
25 years.

1           We got an order from Judge Corely that we  
2     thought would be, like we thought a number of times with  
3     orders, Facebook would then comply with the order and  
4     participate in the ways that it's supposed to and  
5     provide the other information that is consistent with  
6     the order.

7           Here's what we know that shouldn't even be a  
8     matter of dispute, and that is that Facebook should  
9     immediately produce the other [REDACTED] and [REDACTED] memos.  
10    That's just a no brainer. They themselves determined  
11    that those memos were responsive to the order. They  
12    produced them for the six apps. We need the rest of  
13    them.

14           Your Honor has raised this issue of these  
15    underlying communications relating to the background  
16    information relating to the ops.

17           Obviously that information is highly relevant.  
18    It is a context for the conclusions reached in the  
19    memos. That information should be produced, if it's  
20    factual information.

21           We also believe that Facebook can't claim that  
22    it needs more time to review and understand these memos.  
23    These lawyers on this Zoom are the ones that engineered  
24    this process. They obviously have all these memos.  
25    They don't have look for them. They know what's in

1 every single one of them. They need to be produced.

2 On the internal communications, Your Honor,  
3 we are running out of time, and Facebook should not be  
4 allowed to run out the clock. Those materials, which  
5 are clearly consistent with the guidance from the Court  
6 and critical evidence in this case, should be produced  
7 within 30 days.

8 We have depositions coming up. I know  
9 Facebook doesn't want us to have these things so that we  
10 can't use them in depositions. We're entitled to it,  
11 and we want to use the information in depositions.

12 So we would ask that you enter an order that  
13 accomplishes those purposes so we can move this forward  
14 in a way that Judge Corely clearly intended.

15 SPECIAL MASTER GARRIE: Well, go ahead,  
16 Counsel Snyder, and reply. I have some questions.

17 MR. SNYDER: Yeah. Just briefly.

18 The first point is, you know, everything  
19 counsel just said erases the in-camera review process,  
20 which was all about the communications they were  
21 seeking, and that was the whole point of it.

22 Judge Corely, I don't know how many hours she  
23 spent, but she certainly reviewed the non-attorney  
24 communications, including those from [REDACTED]  
25 and the hypothetical kind of documents that counsel

1 referenced.

2 And after doing that, we agreed Judge Corely  
3 gave guidance, and there is no guidance saying produce  
4 non-attorney communications for the six apps, let alone  
5 for the others.

6 And if you look at docket 612, the order, you  
7 know, it disposed of the non-attorney communications  
8 in-camera review, and the order is clear what is  
9 producible.

10 It's not a question of relevance. It's a  
11 question of Judge Corely designing guidance and order  
12 that achieved the balance of giving the plaintiffs what  
13 they needed and proportionality. This is why she said  
14 on the transcript on April 6th, "A lot of it I don't  
15 think is relevant at all." And then she said, "Some  
16 material is privileged and I actually think you don't  
17 even need."

18 And then the plaintiffs told her, "We need the  
19 underlying facts."

20 And the judge obviously went through the  
21 materials and decided that -- that requiring the  
22 production of every communication was -- that was the  
23 whole point of her order. She decided it wasn't worth  
24 digging through all those communications.

25 You know, 611 and 612 was their motion to



1     compel. She then issues her order. And now they're  
2     going back to all communications, which would  
3     essentially turn the whole in-camera review process, you  
4     know, into a nullity. We've been there. We've done  
5     that.

6             And what they are going to -- what -- if you  
7     order us to produce it, what they'll get is a lot of  
8     underlying factual material in these audits, reports,  
9     and interviews.

10            There is a massive number of log-in entries  
11     just for six apps, a massive number, which obviously  
12     informed her thinking and her guidance.

13            Seeing those -- that massive communications  
14     for six apps -- what is it, 6,000?

15            MS. KUTSCHER CLARK: 6,000 entries.

16            MR. SNYDER: -- led her to a proportionate  
17     order, which was reports, audits, interviews, not  
18     communications.

19            The plaintiffs spilled a lot of ink with some  
20     of the same passion and rhetoric they used here, arguing  
21     to Judge Corely why all non-attorney communication  
22     should be produced.

23            She considered it and rejected it, which is  
24     implicit in her order.

25            So they're just coming back for another bite

1 and we've done that, back to ground zero, where they  
2 want all non-attorney communications related to ADI.

3 Counsel also said something about this case is  
4 about ADI.

5 This case is not about ADI. And they're going  
6 to get ADI materials if you order us to produce them  
7 that are going to show all the underlying data.

8 Mr. Southwell, who is in charge of the  
9 investigation, he knows what's in those reports, audits,  
10 and interviews, and it's all the information they're  
11 going to need to see the underlying facts.

12 So proportionality would dictate that we not  
13 be -- consistent with the judge's order, that we not be  
14 required to --

15 SPECIAL MASTER GARRIE: That was one of my  
16 questions. Yeah, sorry for interrupting.

17 MR. SNYDER: -- produce all the memos. Yeah.  
18 Because, you know, particularly with the discovery  
19 cutoff date, you know, Courts have ruled, you know, in  
20 discovery disputes, you know, there are many cases that  
21 hold that -- you know, when you get to the end of  
22 discovery, you know, you need to exercise particular  
23 proportionality and discipline.

24 And, you know, the plaintiffs have wanted from  
25 day one everything.

1 And the judge made I think a very good  
2 compromise, even though we disagreed with the outcome of  
3 producing anything, that the reports, the audits, and  
4 the interviews will be more than enough for what they  
5 need.

6 Now, in terms of the process --

7 SPECIAL MASTER GARRIE: Before you get to the  
8 process, I have a question about the reports. Because I  
9 spent quite a bit of time reading through them because  
10 you guys decided to attach them all to your motions.

11 And one question I had is if -- I don't know  
12 if you have the report up as well. But if you turn to  
13 page 183 of that same report we were just looking at,  
14 and I guess maybe this is for you or -- I'm not sure  
15 Counsel Southwell or who to address the question to.

16

17

18 I'm trying to understand and distinguish,

19

20

21 And if you pull it up for me -- I don't  
22 know -- Counsel Kutscher Clark or Counsel Ko, to  
23 page 183.

24 MS. KUTSCHER CLARK: I would need a minute to  
25 locate it. If Counsel Ko has it at his fingertips, we

1 would appreciate that.

2 SPECIAL MASTER GARRIE: Okay. So can you zoom  
3 in? This is where I'm a little -- I want to just  
4 define, in this -- go up. Up. Freeze.

5 It says [REDACTED] I assume that's -- I'm  
6 not sure -- an individual or an entity. [REDACTED]

7 [REDACTED] No idea -- and if you scroll up, you can read  
8 about what they're doing, but --

9 MR. SNYDER: Why don't I have Alex -- yeah.  
10 Alex, do you want to just sort of detail the  
11 rest?

12 MR. SOUTHWELL: Sure.

13 But, Mr. Garrie, maybe you could ask the  
14 question --

15 SPECIAL MASTER GARRIE: Yeah. Let me get all  
16 the way through.

17 Yeah. So then you see it says [REDACTED]  
18 [REDACTED] And if you go up to the  
19 page above that, 182, that's that whole page right here,

20 [REDACTED]  
21 [REDACTED] et cetera, et cetera; right? You see what I'm  
22 reading, Counsel Southwell?

23 And this is all under the [REDACTED]

24 [REDACTED] Sorry. So let's start at the top.

25 Go to 181, which is just up one more page.

1 This is all under the section of [REDACTED]

2 So you look at [REDACTED] You  
3 have this data; right? And then if you go down, right,  
4 see -- well, first, we can start with 181. Sorry. 181.

5 But you see in there it says [REDACTED]

6 [REDACTED] [REDACTED] [REDACTED]

7 Is that -- I'm confused as to these look  
8 like -- I can't differentiate where they are

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] But I don't see the -- like what's that  
12 mean? Like is that included somewhere?

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 What -- I'm trying to understand [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 MR. SNYDER: Before Alex responds, you know,

1 to the extent that the reports, which were part of three  
2 categories -- which include -- the three categories  
3 contain other material communications, that may well  
4 have influenced Judge Corely's decision to limit her --  
5 the order to these three categories, meaning to say that  
6 as a matter of proportionality, these reports contain a  
7 lot of what I'll call, you know, exogenous information.  
8 You know, we've done this, we've done that. They're so  
9 descriptive that they capture what might be reflected in  
10 millions and millions of pages of so-called work papers  
11 or communications that lead -- led up to the reports.

12 Stated another way, if the reports contain  
13 things like what you just show, that's a helpful point  
14 in our favor and also supporting the reading of the  
15 order, which is that the reports are chalk full of  
16 information.

17 So there's no need to force Facebook as a  
18 matter of proportionality to review literally, you know,  
19 millions and millions and millions of documents to see  
20 what outside the report could inform the report, if what  
21 they're looking at is the underlying facts, particularly  
22 in light of the judge's observation at the hearing that  
23 a lot of the materials contain privileged information.  
24 And she said, "and I don't think you really need."

25 The "I don't think you really need" comment

1 makes sense if you read this report because the report  
2 is not just a bare bones --

3 SPECIAL MASTER GARRIE: Before we -- let's  
4 stay on this report; right? So let me --

5 MR. LOESER: Can I ask a question?

6 SPECIAL MASTER GARRIE: All right. Before we  
7 get to questions, I want my question answered.

8 It says [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 What's that based -- [REDACTED]

14 [REDACTED] -- I'm just trying  
15 to get the context of how one interprets the data in the  
16 report like this that I'm looking at here.

17 MS. STEIN: I think that's an Alex question.

18 MR. SNYDER: Alex, are you there?

19 MR. SOUTHWELL: I'm here.

20 MR. SNYDER: Go ahead.

21 MR. SOUTHWELL: So without just -- you know,  
22 without having reviewed the 400-page report to know  
23 exactly what is there, you're asking about [REDACTED]

24 [REDACTED]

25 There may be. The goal of the reports was

1 basically to pull together all the information strands  
2 into one place so that an assessment, an enhanced  
3 examination of the app could be done.

4 I would have to look at specifically where  
5 these comments are coming. From [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED] And that information is  
9 pulled together in the report here.

10 MR. SNYDER: Which means, Mr. Garrie, to the  
11 extent the reports are produced, they're going to get a  
12 synthesis of what will be in a number of the so-called  
13 communications which explains, I think, quite logically  
14 why the judge ordered what she did. The reports --

15 SPECIAL MASTER GARRIE: Counsel Snyder, I -- I  
16 hear the argument. I'm just --

17 So then my question is: This looks to me --  
18 and I don't want to make any assumptions [REDACTED]

19 [REDACTED]  
20 [REDACTED] Maybe I'm  
21 wrong.

22 But what I'm wondering, it says [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]



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[REDACTED]

Is that correct, Counsel Southwell?

MR. SOUTHWELL: [REDACTED]

[REDACTED]

SPECIAL MASTER GARRIE: [REDACTED] [REDACTED]

[REDACTED]

MR. SOUTHWELL: [REDACTED]

[REDACTED]

SPECIAL MASTER GARRIE: Yeah. That's what I'm trying -- I'm trying to connect the dots; right? So...

MR. SNYDER: So the report reflex [REDACTED]

[REDACTED]

MR. SOUTHWELL: [REDACTED]

[REDACTED]

MR. SNYDER: Right.

1           So that you don't have to go back to the  
2     underlying worksheets or data --

3           SPECIAL MASTER GARRIE: 185. Just scroll down  
4     to 185.

5           So I get your point. I just want to make sure  
6     we're on the exact same -- so keep going down. Right  
7     there. Freeze.

8           It says [REDACTED] [REDACTED]  
9     [REDACTED]  
10    [REDACTED]

11           I don't even -- I can't do the math. [REDACTED]  
12    [REDACTED]  
13    [REDACTED]

14           There's underlying data that supports this  
15     conclusion -- I'm just trying to understand if  
16     there's -- what are the sources of information -- like  
17     there's a big difference between looking at, like,  
18     petabytes and petabytes of data, right, to get this  
19     conclusion, or is there a summary note somewhere where  
20     someone did this analysis and pulled it out of the  
21     system?

22           MR. SOUTHWELL: I'm not sure that I follow,  
23     Mr. Garrie.  
24    [REDACTED]  
25    [REDACTED]

1 [REDACTED] That's what we're looking at.

2 SPECIAL MASTER GARRIE: So this is -- [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 Okay?

7 MS. STEIN: Are you trying to get -- is your  
8 question whether underlying data was e-mailed to [REDACTED]  
9 and like how they --

10 SPECIAL MASTER GARRIE: Yeah. Provide --  
11 yeah. Like was this shared -- like how did they get  
12 this information -- like how did this information come  
13 to be?

14 MR. SOUTHWELL: [REDACTED] [REDACTED]

15 [REDACTED]

16 SPECIAL MASTER GARRIE: You say "they." Who's  
17 "they"?

18 MR. SOUTHWELL: [REDACTED] and [REDACTED] [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 SPECIAL MASTER GARRIE: [REDACTED]

22 [REDACTED]

23 MR. SOUTHWELL: [REDACTED]

24 [REDACTED]

25 SPECIAL MASTER GARRIE: [REDACTED]

1 MR. SOUTHWELL: Yeah.

2 MR. SNYDER: [REDACTED]

3 However -- whatever buttons you push to extract data  
4 from.

5 SPECIAL MASTER GARRIE: I get it. I get it.  
6 I just want to understand that.

7 Okay.

8 MR. SNYDER: One more point, Mr. Garrie, I  
9 just wanted to make is, in attempting to find some basis  
10 to go beyond the order and get so-called underlying  
11 information, I'll just -- one of the things counsel said  
12 is if during the investigation they found a scoff log  
13 app and took some action, you know, we want to know  
14 that.

15 The fact is ADI concluded more than two years  
16 after this case was filed the entire investigation was  
17 conducted -- started after this case was filed. The  
18 investigation was initiated a few days after the first  
19 class action -- of the underlying, you know, class  
20 actions were filed.

21 So in other words, none of that really is  
22 relevant to this case about Facebook's, you know,  
23 practices prior to ADI.

24 And so -- so what I understood plaintiffs to  
25 be saying before was the underlying data about, you

1 know, apps that were in violation of our platform rules  
2 was of interest to them.

3 And as you can see from these reports, which  
4 are chalk full of information, they're going to get that  
5 information if you order it produced.

6 So that is consistent with the order and  
7 consistent with proportionality, and what you're going  
8 to find is that these reports were designed so that [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 SPECIAL MASTER GARRIE: Can you go down to  
20 page 223, just quickly?

21 Because my confusion comes from if you go down  
22 to -- right here.

23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

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[REDACTED]

All my question is, [REDACTED]

[REDACTED]

[REDACTED] This looks like it's a --

MR. SNYDER: [REDACTED]

[REDACTED]

And just, again, I keep on going to advocacy.  
It goes to our point.

[REDACTED]

[REDACTED] I mean, that's -- that's --

SPECIAL MASTER GARRIE: My other question is:  
Is this the entire table? Because it looks -- when the  
.pdf was generated, there's cutoff there, and you  
can't -- like, you see the word "completed," it cuts the

1 "d" off.

2 You go back up.

3 Zoom in.

4 MR. SNYDER: That's just a bad copy. We're  
5 not -- I don't think we're -- I don't think --

6 SPECIAL MASTER GARRIE: I'm not saying you  
7 are. I'm just asking --

8 MR. SOUTHWELL: This is attached to  
9 plaintiffs' filing, I believe. I'd have to go back to  
10 the original source.

11 SPECIAL MASTER GARRIE: Yeah. I didn't get  
12 the -- I didn't want to ask for the exemplars. I just  
13 didn't know.

14 MR. SNYDER: Yeah. It just looks like they  
15 cut it off however they --

16 MR. SOUTHWELL: I think that's everything. I  
17 think it's everything.

18 MR. KO: That's how we received it. We  
19 received it as .pdf. This is exactly replicated.

20 MR. SNYDER: Mr. Garrie, my final point is, in  
21 terms of rebuttal, I think -- unless my team has  
22 anything else -- it's not as easy as produce all  
23 reports.

24 Under the guidance of Judge Corely's order,  
25 because she had made -- she made a clear point of saying

1 that there are still attorney-client and work product  
2 protections that -- that are applicable to these  
3 documents, we have to review everything for privilege.  
4 And, you know, even the dual purpose is document by  
5 document.

6 There's no categorical ruling that every  
7 document --

8 SPECIAL MASTER GARRIE: We'll get into that in  
9 a second because I have a set of questions for both  
10 parties.

11 So Derek -- or Counsel Ko, you can stop.

12 But I would just ask that you confirm,  
13 Counsel Ko, that it is indeed the .pdf is how you got --  
14 just for my own edification since I had to read through  
15 it all, to make sure that that was -- you got the  
16 entirety of it.

17 MR. SOUTHWELL: Yeah. I believe --

18 MR. KO: Again, I think --

19 MR. SOUTHWELL: [REDACTED].

20 MR. KO: Yeah. And it's -- you can tell from  
21 the .pdf, you can see the Bates number, the labels that  
22 Facebook put on it at the bottom here. Here, I'll share  
23 it real quickly.

24 But I can confirm for you right now that this  
25 is indeed the copy that we received.



1 MS. WEAVER: And so one question we have had  
2 is are these from a project management system that has a  
3 COMs tool that extracted data? Is that the data source?  
4 And could we get it in native or no?

5 MR. KO: We just received 11 .pdfs in terms of  
6 how Facebook responded to Judge Corely's September 8  
7 order, and you can see that --

8 SPECIAL MASTER GARRIE: I have a question  
9 about -- we're going to talk about producing reports and  
10 those in a second, and the format and other things,  
11 which is because of that.

12 My first question regarding that is [REDACTED]  
13 [REDACTED]  
14 [REDACTED] how many  
15 actual reports are we talking about?

16 Not pages. You guys love pages. But I'd like  
17 to know just number of reports.

18 MS. KUTSCHER CLARK: I don't have the exact  
19 number, but I believe it's in the range of [REDACTED]  
20 reports. And they vary tremendously in length.

21 SPECIAL MASTER GARRIE: I get it --

22 MR. LOESER: And just for clarification on  
23 your question, Special Master Garrie, we're focused on  
24 the phase 3 and 3 issues. So the reports --

25 SPECIAL MASTER GARRIE: We got it.

1           So I'm just -- I want to understand -- so  
2       we'll round up.

3           [REDACTED] reports, more or less?

4           MR. SOUTHWELL: Yeah. I think it's a little  
5       bit higher than that, like maybe [REDACTED] memos. Those  
6       are the memos, reports from [REDACTED] that plaintiffs I  
7       think are referring to.

8           SPECIAL MASTER GARRIE: Well, I didn't see  
9       anything from -- well, like they referenced [REDACTED]

10          MR. SOUTHWELL: The [REDACTED] ones look the same.  
11       They're different firms that are doing --

12          SPECIAL MASTER GARRIE: No, no. The reason  
13       why I ask is in that report we were looking at, they  
14       reference the analysis [REDACTED]

15       [REDACTED]

16               Does anybody know who 13302 is?

17               Off the record.

18          MR. LOESER: I think that's Orin.

19          MS. KUTSCHER CLARK: Yeah, that's Orin.

20          SPECIAL MASTER GARRIE: Back on the record.

21               Okay. So we have [REDACTED] total reports.

22               That includes 1, 2, and 3, that whole funnel  
23       thing. And that's a everything [REDACTED] and [REDACTED] did. It  
24       looks like [REDACTED]

25       [REDACTED] -- I -- I couldn't exactly tell from the reports,

1 but [REDACTED]

2 [REDACTED]

3 Is that correct?

4 I can be very specific if you want. We can go  
5 back to 141 and I can --

6 THE COURT REPORTER: I'm sorry. Who's  
7 speaking?

8 SPECIAL MASTER GARRIE: Special Master Garrie.  
9 141. I think it's page 141 -- it's not 141.  
10 It's below.

11 MR. KO: Special Master Garrie, while you're  
12 looking at that, one thing that's important -- an  
13 important point to make, Judge Corely never received  
14 these reports. She did not see them.

15 So this idea that Judge Corely knew that just  
16 producing these reports would be sufficient and adequate  
17 to respond to our request is just false because she's  
18 never seen it.

19 The only document she's ever seen are the  
20 20 documents from the six exemplar apps that she found  
21 were not useful.

22 MS. KUTSCHER CLARK: If I could respond to  
23 that, though.

24 Judge Corely did allow a factual declaration  
25 from Mr. Southwell about these materials where he

1 described these reports and their contents in pretty  
2 great detail.

3 So I think she had a fairly good understanding  
4 of what they were.

5 MR. KO: Did she -- she didn't ever see these  
6 reports?

7 SPECIAL MASTER GARRIE: Please don't interpret  
8 my silence as an opportunity to speak. I'm just looking  
9 for the [REDACTED] I know both positions for the record. I  
10 just -- I have my question I want answered, and then  
11 feel free to discuss further, if appropriate.

12 MR. SOUTHWELL: Is it page 137?

13 SPECIAL MASTER GARRIE: Yeah. Thank you very  
14 much. Let me just go up and make sure.

15 Yeah. Page 137.

16 So where it says [REDACTED] on the second  
17 bullet.

18 Is it the second bullet? Yeah --

19 No. First bullet. First bullet, last two  
20 lines.

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 Was there [REDACTED] document that went along with  
25 the [REDACTED] report?

1 MR. SOUTHWELL: Are you referring to this  
2 particular report?

3 No. There was an [REDACTED]  
4 [REDACTED]  
5 [REDACTED]

6 SPECIAL MASTER GARRIE: This wasn't clear from  
7 the -- okay.

8 So then when we say [REDACTED] it is the reports,  
9 [REDACTED]

10 MR. SOUTHWELL: It's the reports and memos  
11 that I think is what plaintiffs are seeking. Yes. It's  
12 what -- the things that we're looking at right here.

13 MR. SNYDER: And then, Alex, in terms of  
14 audits and interviews by non-attorneys, what's the  
15 number of those?

16 MR. SOUTHWELL: I'd have to look. [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 [REDACTED] I mean, that's port of what we  
20 would need to review.

21 MR. SNYDER: Right.

22 SPECIAL MASTER GARRIE: Okay. Of the [REDACTED]  
23 that's the total, how many are in 2 and 3?

24 MR. SOUTHWELL: Is that a question for me?

25 I don't -- 2 and 3 don't actually make a lot

1 of sense for what we're talking about here, so not sure  
2 how to answer that. It's not really a conception that  
3 is logical in talking about the reports.

4 SPECIAL MASTER GARRIE: I agree. But,  
5 Counsel, I believe -- were reports not generated for  
6 group 1?

7 Initially you described it as a three-phased  
8 approach; right?

9 So Phase 1 was X and Phase 2 and Phase 3  
10 were -- unless plaintiffs, you understood it as --

11 MR. LOESER: No. That's Mr. Southwell's own  
12 description in his declaration of the phases of the  
13 investigation and of the report.

14 So I --

15 SPECIAL MASTER GARRIE: Yeah. That's how I  
16 read it as well.

17 MR. KO: And then the memo --  
18 Special Master Garrie, as you can see, the memo makes  
19 clear [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 MR. SOUTHWELL: Right.

25 MR. LOESER: We didn't come up with these

1 phases. They did.

2 MR. SOUTHWELL: I -- Mr. Garrie, if I could  
3 explain, if you like.

4 SPECIAL MASTER GARRIE: Yeah.

5 MR. SOUTHWELL: So the first phase is  
6 "Identification." The second phase is "Enhanced  
7 Examination." That's when we did reports. The third  
8 phase is "Enforcement," which is when we took certain  
9 actions with respect to the apps, depending on the  
10 results of the reports, which included seeking RFI  
11 information from the developers, having back and forth  
12 with them about that information. And then potentially  
13 doing audits and interviews and/or taking enforcement  
14 action, such as cease and desists, like what we did  
15 with [REDACTED]

16 MS. STEIN: And just to be --

17 MR. SNYDER: What was 4? What was 4, Alex?

18 First is identification, second was enhanced  
19 examination, third enforcement.

20 THE WITNESS: That's it. There's just three.

21 MR. SNYDER: Just three.

22 MS. STEIN: And just to be clear, the  
23 communications with developers, as explained to  
24 Judge Corely, is a category with -- you know, that -- of  
25 documents that were produced.

1 MR. SNYDER: Right.

2 MR. KO: And we understand they're still being  
3 produced.

4 SPECIAL MASTER GARRIE: Whether they've been  
5 produced or not is not what we're here to discuss.

6 But if we look in these reports, [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 All right. I showed you that one we were  
10 looking at about [REDACTED] and I don't  
11 know where to go.

12 MR. KO: Right here.

13 SPECIAL MASTER GARRIE: No. It was down.

14 MR. KO: I think there was two.

15 SPECIAL MASTER GARRIE: So when we say  
16 communications with developers, they've already -- well,  
17 I don't want to go -- I don't want to -- on second  
18 thought, my question -- let me just finish my first  
19 thing.

20 Anything that happened -- while he's pulling  
21 that up, anything that happened in enhanced examination  
22 got a memo.

23 Is that it?

24 So there's [REDACTED] memos that fall within  
25 enhanced examination.



1 MR. SNYDER: Well, no. I mean -- the reports  
2 reflect what about the enhanced examinations?

3 SPECIAL MASTER GARRIE: That's what I'm trying  
4 to figure out.

5 MR. SOUTHWELL: The reports are the enhanced  
6 examination. In other words, once we --

7 MR. SNYDER: Got it.

8 MR. SOUTHWELL: -- identified something for  
9 enhanced examination, we then conducted the enhanced  
10 examination, which was the report and other related  
11 activity.

12 SPECIAL MASTER GARRIE: That's phase -- that's  
13 why you said it doesn't make sense because if there's a  
14 report, you were already in Phase 2. So Phase 1 is not  
15 relevant.

16 Okay. Now, the communications that you had  
17 with the developers, [REDACTED]  
18 [REDACTED] I thought it  
19 was but maybe I misread it.

20 MR. SNYDER: So, Alex, after there's an  
21 enhanced investigation, there's a decision to escalate  
22 to enforcement and there's an e-mail sent to a developer  
23 or an RFI sent to a developer.

24 And, Mr. Garrie, in a handful of instances, we  
25 filed lawsuits against them. Obviously those are public

1 documents.

2 But, Alex, in the panoply of enforcement  
3 activities, there are communications, right, between  
4 Facebook or counsel, right, us, and a third party app  
5 developer?

6 MR. SOUTHWELL: Right. Those all emanated  
7 from the [REDACTED] mailbox, which is the mailbox that  
8 was agreed to be searched.

9 Mr. Garrie, you're pointing to an earlier  
10 correspondence. This appears to be just, based on the  
11 face of it, from a correspondence from 2012.

12 MR. SNYDER: Right.

13 MR. SOUTHWELL: But as a part of the  
14 examination and enforcement activity, we would interact  
15 with developers through the [REDACTED] mailbox.  
16 That's the mailbox from which third-party correspondence  
17 was produced.

18 SPECIAL MASTER GARRIE: So that's how you're  
19 defining communications?

20 MR. SNYDER: Yeah.

21 So we've already -- to the extent -- so what  
22 we're objecting to and what there's debate about is not  
23 about once we, after enhanced examination, enter an  
24 enforcement phase and deal with third-party --  
25 third-party app developers, that we've produced or

1 we're producing.

2 What we're objecting to, and we think  
3 Judge Corely, you know, ruled on for proportionality  
4 reasons, is all of what counsel called worksheets. It's  
5 all of the e-mails and internal correspondence that  
6 surrounded and led up to and rolled up into these  
7 enhanced examination reports about apps. That in some  
8 cases -- many cases, pull from those so-called work  
9 materials and roll them up as relevant into these  
10 reports.

11 So the reports reflect and capture a lot of  
12 the communications that the plaintiffs seek, we're  
13 objecting to -- if there's [REDACTED] reports, my guess is,  
14 Alex, there's probably, you know, [REDACTED] documents  
15 or some multiple of that, that would surround each of  
16 these enhanced examination inquiries.

17 And so that's I think what we're fighting over  
18 here right now.

19 Do we have a sense, Alex and team, of the  
20 magnitude and scope of those so-called communications or  
21 what counsel is calling the work papers that led up to  
22 these reports?

23 From my team, do we have a sense of what the  
24 volume would be?

25 MR. LOESER: Haven't they been logged?

1 MR. SNYDER: I don't know. That's why I'm  
2 asking my team.

3 MR. LOESER: Well, if they've been withheld, I  
4 assume they've been logged.

5 MR. SNYDER: I don't know.

6 SPECIAL MASTER GARRIE: Time out. Let his  
7 team answer the question.

8 MR. SNYDER: Do we have a sense, guys?  
9 Millions? Hundreds of thousands? Alex?

10 MR. SOUTHWELL: If the question is what was  
11 the amount of communication between, for example,  
12 Gibson Dunn and Facebook or [REDACTED] and Facebook, it's  
13 millions and millions.

14 MR. SNYDER: Right. That's what I would  
15 think.

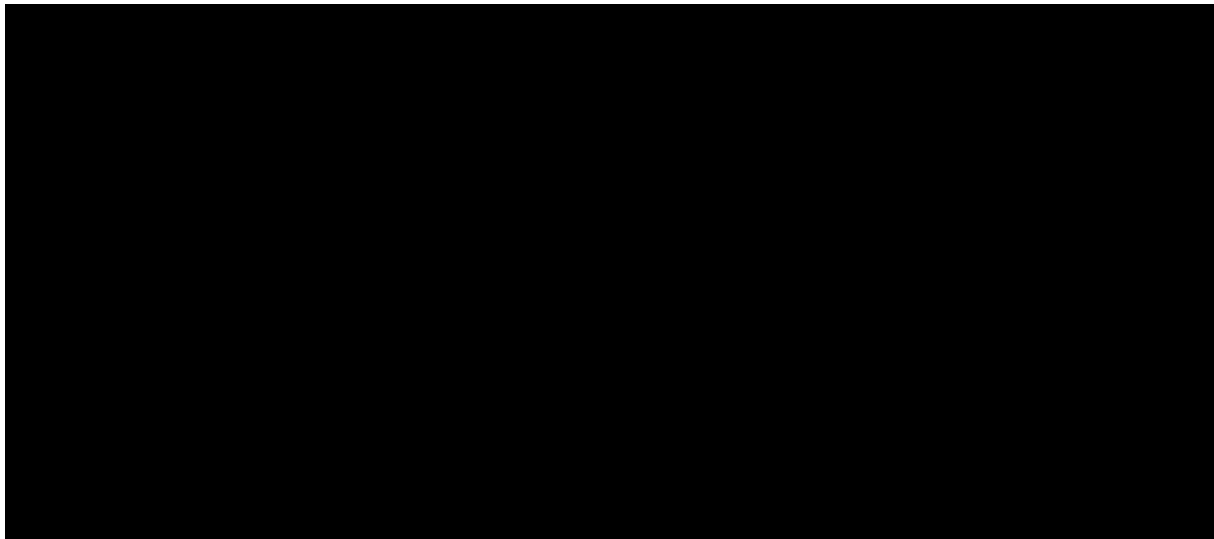
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 So if what they're looking for, Mr. Garrie, is  
21 the underlying facts, they're going to get the  
22 underlying facts here in these reports.

23 SPECIAL MASTER GARRIE: Noted. All right.

24 MR. SOUTHWELL: Mr. Garrie, if I could make  
25 one additional point about that.

1           The conception of audit work papers is not  
2   really applicable. As you can see from the reports,



11           MR. LOESER: So, Special Master Garrie, could  
12 I just briefly respond to a couple of factual points  
13 that I think could be helpful, just to keep in mind, or  
14 do you have other questions, and I can.

15           SPECIAL MASTER GARRIE: I wrote my questions  
16 down.

17           Go ahead.

18           MR. LOESER: Okay. So first thing I think is  
19 really important to understand is that the entire ADI  
20 was a retrospective examination. It was always back  
21 looking, it was always back to a period of time within  
22 the class period.

23           So the idea that somehow these materials  
24 are -- don't matter because they're after the fact,  
25 that's just -- that's not true.

1           The issue of proportionality, there's not one  
2       word in Judge Corely's order about proportionality.  
3       Judge Chhabria had said something about proportionality,  
4       which is that this is a big case and that's not the kind  
5       of argument that would be effective.

6           Factually, the thing I think that's really  
7       critical to keep in mind is Judge Corely has not seen  
8       any of these reports.

9           And so when Mr. Snyder talks about the  
10      conclusions she drew from the language that you showed  
11      in the report we were looking, that's not possible. She  
12      didn't have any of these things so she couldn't have  
13      drawn any conclusions from that actual language.

14          And then lastly, Your Honor, we're talking a  
15      lot about the underlying information and the

16      [REDACTED]

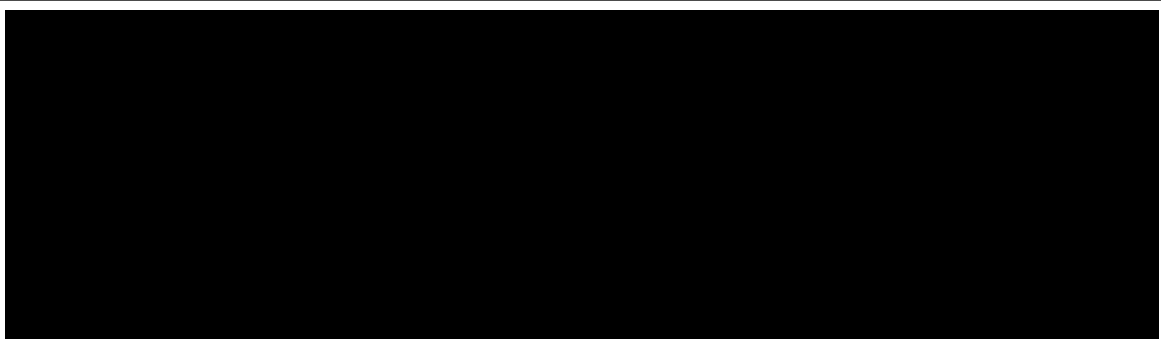
17      [REDACTED] And  
18      that is important. But what also is really important  
19      and critical is the internal Facebook communications.

20          Facebook has provided not one document from  
21      inside Facebook that discusses [REDACTED]

22      [REDACTED]  
23      [REDACTED]

24          That you've identified -- here is just an  
25      example. [REDACTED]

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Okay. That's helpful information and we will be very grateful for an order requiring the production of all these memos.

But also what is critical is what is it exactly that Facebook itself said and did with this information? Because that goes to the heart of the litigation.

One of the categories of misconduct here is the failure to police what apps were doing. And it is critical to know -- and we know nothing, we don't have a single -- Facebook has really effectively eliminated from discovery its own internal conversations about these enhanced examinations and the investigation. And that's what we need. That's what they have no plausible credible argument why Facebook -- unlike every other company in the world, there's a special rule for Facebook.

And its own discussion of matters at the heart of the litigation, it's allowed to completely conceal? And we're left with what third parties say. We do want

1     what third parties said about their misconduct. But  
2     this whole conversation about the communications with  
3     the app developers, the background data, the questions  
4     you're asking, that's really important, but let's not  
5     lose sight of the volume of information that  
6     presumably -- I mean, maybe it's millions of pages, you  
7     know, if we're just going to make up numbers, but I  
8     really doubt it.

9             But there are people that are the Facebook  
10    professionals that live and work there, engineers,  
11    DevOps, and when they got a report like this, it is  
12    impossible to believe that they didn't go, "Whoa,  
13    there's another Cambridge Analytica" or "I can't believe  
14    we did it again" or "Oh, my God, another access to  
15    friends data that people didn't authorize."

16            This is a huge problem. We get that  
17    information, and they have no credible basis for denying  
18    it.

19            And if Judge Corely had wanted to rule that  
20    out, information that lies at the heart of every major  
21    litigation in America, she would have said so, and she  
22    didn't. She did not rule that out.

23            And so I just don't want to lose sight of how  
24    important that is.

25            SPECIAL MASTER GARRIE: Understood.



1           Before we go down a rabbit hole here, let me  
2 ask my question and then Counsel Snyder --

3           Counsel Snyder, you can respond.

4           MR. SNYDER: In brief.

5           Then enforcement issue is not ADI and what we  
6 did after the litigations are filed or what -- the issue  
7 is whether Facebook at the time, the relevant time of  
8 the case, properly enforced its platform -- platform  
9 policies.

10           And so, you know -- and then, you know -- and  
11 the -- and if, you know -- I've said from the beginning  
12 and I'll say again, you know, this is -- actually  
13 there's a certain irony to this madness because they're  
14 the most -- [REDACTED]

15 [REDACTED]  
16 [REDACTED]

17           You know, I've said before and I'll say it  
18 again, there is nothing like Cambridge Analytica. And  
19 the plaintiffs are ultimately -- you know, are going  
20 into a dry hole with all of this.

21           Having said that, [REDACTED]

22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1           And if after reviewing all those reports they  
2     want -- they say, "We need more with respect to app 6,  
3     7, and 8 because we think the reports are insufficient,"  
4     you know, I guess they can come back again and ask for  
5     that.

6           But, you know, they're going to have a lot of  
7     facts to work with on [REDACTED] reports, and they're going to  
8     see this is a dry well, honestly.

9           So I think that, you know, in terms of  
10    proportionality and order of proceedings, that if you're  
11    going to order us to produce those three categories, we  
12    should start there.

13          And, you know, I think, again, if they want  
14    information, you know, it's not -- and it's not going to  
15    take a night or even 30 days to do that because even  
16    Judge Chhabria ruled, when we were simply reproducing to  
17    the plaintiffs, reproducing our FTC productions, meaning  
18    we had a file that said "FTC Production," we could have  
19    literally just forwarded it to the plaintiffs.

20          But Judge Chhabria said, "No."

21          And when the plaintiffs said, "Well, they  
22    could just push forward on that file."

23          And Judge Chhabria said, "No." They have  
24    every right to review those FTC productions for  
25    privilege because we produced stuff to the FTC that we

1 wouldn't produce to private plaintiffs because they're  
2 our regular.

3 So too here. We can't just hit forward on  
4 [REDACTED] reports because as you see, embedded in the reports  
5 are a lot of information and we're going to have to  
6 review them and redact anything and log that may be  
7 privileged. Maybe Southwell sent an e-mail to  
8 [REDACTED] that is embedded in a report.

9 And so, you know, again, jumping the gun, if  
10 you order us to produce reports, we can do it on a  
11 rolling basis, but we're going to need to have attorneys  
12 put eyes on [REDACTED] reports. And consistent with the  
13 guidance the judge gave us, withhold anything that's  
14 either work product or attorney-client privilege.

15 SPECIAL MASTER GARRIE: One of the issues --  
16 we can jump into it now --

17 And so, Counsel, is there anything you want to  
18 say or -- I have a question or two.

19 MR. LOESER: We have six reports here.  
20 There's not a word redacted or removed because  
21 Judge Corely ordered that none of this was privileged  
22 or protected by work product.

23 So it's impossible to believe that Facebook  
24 genuinely believes it now gets to apply the same  
25 rationale for withholding that it was -- was rejected

1 by Judge Corely and resulted in the production of these  
2 memos that we have that don't have anything removed from  
3 them because they already have an order saying that work  
4 product doesn't apply and none of the information is  
5 privileged.

6 So it's -- we can keep -- we can keep  
7 constructing reasons for delay, but the fact of the  
8 matter is, obviously there was an analysis done by  
9 Facebook to produce what we have, and I think it's  
10 telling that there's no -- there's nothing removed from  
11 them.

12 MR. SNYDER: Two points: One, since counsel  
13 is an advocate for and a booster of fidelity to the  
14 record, Judge Corely did not issue a categorical ruling.  
15 She said that, quote, "Facts underlying ADI may be  
16 discoverable but" -- in her comments at the hearing  
17 that preceded the order, "but not information as  
18 attorney-client privilege or attorney-client work  
19 product."

20 So the guidance goes to relevance, burden,  
21 proportionality, and then document specific privilege  
22 concerns. And if it turns out that [REDACTED] reports have  
23 no privileged material, or however many you order us to  
24 produce, if any, with no redactions.

25 But we have the right to review these

1 materials for privilege, and we'll --

2 SPECIAL MASTER GARRIE: So with that in mind,  
3 right, if -- you have a month -- you have -- you're  
4 doing this on a monthly basis, and given the timelines  
5 and cutoffs, I don't know if that will work or is  
6 practical, given the January cutoff date.

7 MR. SNYDER: I mean, what I would suggest is,  
8 again, plaintiffs' counsel doesn't believe this, they  
9 tend to not believe anything I say, but there is -- you  
10 know, Mr. Southwell is sitting here, and I can tell you  
11 without waiving privilege this is a dry well. I mean,  
12 they're very excited about this well, but it's a dry  
13 well.

14 So, I mean, maybe we start -- if you're  
15 inclined to order us over our objection to produce  
16 reports, which we have to object for the record because  
17 we, you know, obviously took a contrary position before  
18 Judge Corely's order, all the reports seem excessive.  
19 I mean, maybe we produce some -- some percentage of  
20 them, if you're inclined to order that, as opposed to  
21 every single one.

22 But if you were to order us to produce them  
23 all, it --

24 Martie, I know you've done an analysis of how  
25 long you think that would take to do.

1 MS. KUTSCHER CLARK: Yeah. I think in all,  
2 given the volume, it would take a few months  
3 realistically. I think at least three, maybe four. But  
4 that would be to get through every single one of them.

5 And as Mr. Snyder said, what we could do is  
6 produce on a rolling basis. So we would get started on  
7 them right away and produce them as they're ready to go.

8 And, you know, I'll add that when we dealt  
9 with this issue with the FTC productions, plaintiffs  
10 pushed back tremendously on the notion that we were  
11 going to review everything for privilege. We didn't  
12 withhold anything ultimately that we produced to the  
13 FTC. We just gave it a review.

14 And that's what we're looking at here is we  
15 just --

16 SPECIAL MASTER GARRIE: Judge Chhabria said it  
17 and Corely, you know -- if you want to spend the time  
18 and effort to review them for privilege, that is your  
19 right. Whether you want to devote the additional  
20 resources that it may cost your client, that's their  
21 right to incur those costs to meet that.

22 MR. SNYDER: Want would be the wrong word. We  
23 would be professionally obligated to do it.

24 SPECIAL MASTER GARRIE: Fair enough, Counsel.  
25 Noted for the record.

1           Is there a list of the [REDACTED] like if you were  
2       provided a list of the top [REDACTED] apps to get started with  
3       and they gave it to you in tranches of [REDACTED]  
4       or something like that, right, would that -- of  
5       developers. I'm not talking apps anymore. I'm talking  
6       developers. If they gave it to you in tranches of  
7       [REDACTED] because I think there's only a -- and correct me  
8       if I'm wrong, but how many were actually in Phase 2,  
9       developers? Counsel Southwell?

10           MR. SOUTHWELL: Sorry. I'm not sure that I  
11       follow the question.

12           SPECIAL MASTER GARRIE: How many developers  
13       ended -- app developers were in Phase 2?

14           You made me that spreadsheet. I just don't  
15       have it handy.

16           MR. SOUTHWELL: I mean, I don't know the  
17       number offhand. I mean, in terms of the ultimate number  
18       of suspensions, there were, you know, [REDACTED]

19           SPECIAL MASTER GARRIE: That was Phase 3;  
20       right?

21           MR. SOUTHWELL: -- of developers -- yeah. So  
22       I don't know that number offhand.

23           If you're -- are you referring to a particular  
24       spreadsheet that we provided you with that information.

25           SPECIAL MASTER GARRIE: You provided it, I

1 believe, in other proceedings, and I thought you might  
2 have that information handy.

3 But if you don't, that's fine.

4 MR. SOUTHWELL: Not off the top of my head,  
5 no.

6 SPECIAL MASTER GARRIE: But if plaintiffs --

7 MR. KO: Can I ask you a question really  
8 quickly?

9 Before we go down this road of -- I think it's  
10 important to talk about what the [REDACTED] consist of.

11 But before we do so, I think it's also  
12 important to go back a step and talk about this process  
13 and Facebook's purported or apparent right to look at  
14 everything.

15 There's a huge difference between their -- the  
16 parallels that they're drawing between the FTC review,  
17 of which a privilege dispute was not at issue before  
18 Judge Chhabria.

19 And this ADI investigation, which has been two  
20 years of litigation about privilege and resulted in the  
21 order that Judge Corely issued. She --

22 SPECIAL MASTER GARRIE: I understand,  
23 Counsel Ko. But if they want to hire 300 people to  
24 review them so they can meet the timeline I set, that's  
25 their choice.



1 MR. KO: Fair enough. Yeah. Fair.

2 SPECIAL MASTER GARRIE: I mean, or the  
3 timeline may only require 10.

4 But the point is, is that if they want to  
5 exercise that, then they shall.

6 Okay. Going back.

7 The question I had was do these reports  
8 encompass all three buckets? I just want to go back and  
9 reread the buckets.

10 The one, two -- I just want to make sure  
11 we're -- the numbers we're getting and kicking around  
12 are actually -- so I have a --

13 MS. STEIN: You mean the different phases?

14 SPECIAL MASTER GARRIE: Yeah.

15 MR. SNYDER: So if we identified something  
16 worthy of enhanced examination, then it necessarily is  
17 going to be in a report. If an app is not identified,  
18 it's a tree falling in the forest that's never heard.

19 So I think, Alex, as I understand it, to the  
20 extent we identified an app that was, you know,  
21 suspected or believed to have some hair on it, that was  
22 subject to enhanced examination, there's a report  
23 generated. And then to the extent we decided to take  
24 action, enforcement action through an audit, an  
25 interview, or an RFI or a lawsuit, we've already

1 produced or agreed to produce those communications with  
2 third parties.

3 Is that fair, Alex?

4 MR. SOUTHWELL: Yeah. That's right.

5 I would just add that if in the identification  
6 detection phase we identified something we just had a  
7 question about, right, didn't even necessarily need to  
8 have hair on it, there was a question and so we wanted  
9 to get to the bottom of it. And we then went into  
10 enhanced examination, did a report, and then we took  
11 steps from there.

12 MR. SNYDER: Imagine [REDACTED] was  
13 an app -- I'm just making it up; right -- and it was not  
14 identified for any issues, you know, there's not going  
15 to be enhanced examination about the [REDACTED] that's a  
16 wrong example -- but, you know, I would assume, Alex,

17 [REDACTED]  
18 [REDACTED]

19 So it's --

20 SPECIAL MASTER GARRIE: I just want to make  
21 sure I understand.

22 Reports -- there are [REDACTED] of them. You had  
23 millions of apps. But [REDACTED] reports which probably  
24 represent [REDACTED] just based  
25 on the reports --

1 MR. SOUTHWELL: [REDACTED]

2 SPECIAL MASTER GARRIE: [REDACTED] I mean,  
3 I'm not [REDACTED] I'm not  
4 exactly sure. But at least more than [REDACTED] It's not  
5 one to one.

6 But then any audits and interviews, those fall  
7 out of Phase 3 and are in the process of being produced?

8 Like, are audits and interviews -- how many  
9 are we talking about?

10 MR. SOUTHWELL: If you're asking about  
11 Phase 3, so Phase 3 involved --

12 SPECIAL MASTER GARRIE: Because you said  
13 audits and interviews.

14 MR. SOUTHWELL: Right. But there are a few  
15 steps to it.

16 There's seeking the information from the  
17 developer, and that is the process of RFI and back and  
18 forth. That's what was done through the [REDACTED]  
19 mailbox. That's what's already been produced. That's  
20 the back and forth.

21 Sometimes we did an interview on top of the  
22 RFI process that was back and forth.

23 I don't know off the top of my head how many  
24 interviews there were. You know, [REDACTED] [REDACTED]

25 [REDACTED] [REDACTED]

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[REDACTED]

And then there were also some audits, but I don't have the number off the top of my head.

MR. SNYDER: So only the audits and interviews conducted by nonlawyers we're producing.

And so basically all three phases are captured in any production that includes the reports and then those third-party communications between audits or interviews involving non-attorneys.

SPECIAL MASTER GARRIE: When you say audits --

MR. KO: Just a clarifying question.

Special Master Garrie, you might be asking the same question, but, you know, we thought that audits were performed by [REDACTED] or another third party or perhaps even by a Facebook DevOps individual or at least that individual --

SPECIAL MASTER GARRIE: Well, I have questions about the audits part so table the question. I'll let you ask the question in one second. I just want to finish interviews, and then we'll get to audits.

[REDACTED]

Is that right, Counsel? Is that what you're --

MR. SOUTHWELL: Yes. That's right.

1           SPECIAL MASTER GARRIE: Okay. Now, we're  
2 going to talk about the privilege logs I got in a  
3 second. I'm going to have some -- I just want to  
4 understand the 99 that we were -- but we'll save that  
5 for once we finish this.

6           So interviews, any idea how many will  
7 actually -- I mean, if you conducted it, the privilege  
8 review should be pretty quick; right? Your name is at  
9 the top as the person --

10          MR. SOUTHWELL: Yeah. I mean, if we're  
11 looking for non-attorney conducted interviews, I don't  
12 know how many there were. [REDACTED]

13 [REDACTED]

14          SPECIAL MASTER GARRIE: And how many --

15          MR. LOESER: I'm sorry. Are these interviews  
16 with third parties? Is that what we're talking about?

17          SPECIAL MASTER GARRIE: Any interview. I  
18 think it's -- I read it as any interview. It's not  
19 limited to third parties. It's any interview they  
20 conducted in connection with the enhanced examination  
21 process, whether it was with Facebook individuals or if  
22 it was with third parties.

23               Is that not --

24               You're not distinguishing the two, are you,  
25 Counsel Southwell?

1 MR. SOUTHWELL: Sorry. I'm not sure that I  
2 followed.

3 MS. KUTSCHER CLARK: I'm just showing the  
4 relevant -- oh, I'm sorry.

5 SPECIAL MASTER GARRIE: Yeah. So interview --  
6 yeah. It's on page -- well, it's in several places.  
7 Page 1, on line 24 to 26.

8 But -- interviews; right? If you interviewed  
9 a -- let's say you're doing an enhanced examination, and  
10 in the enhanced examination they say, blah, blah, blah,  
11 whatever.

12 And then you're like, "Oh, we need to talk to  
13 the Facebook app team and interview them about some part  
14 of the enhanced examination," would that -- an  
15 interview being -- you're not saying all interviews were  
16 done with third parties, are you?

17 MR. SOUTHWELL: I think -- I think we are  
18 saying that. That's what -- the interviews were of  
19 developers and various people on the developer staff.

20 SPECIAL MASTER GARRIE: Only third parties?  
21 No internal Facebook interviews were conducted?

22 Because you don't distinguish, so I always  
23 just assumed it may include both, but you're saying it  
24 doesn't.

25 MR. SOUTHWELL: If we're referring to the

1 enforcement phase of the efforts, then --

2 SPECIAL MASTER GARRIE: No, no, no. I'm  
3 referring to this content.

4 She says -- where is the highlighted -- your  
5 motion in her order -- in her order on page 1, I know  
6 she summarizes it and I think she does it here, too.

7 Audit -- on page 1 of the order, on line 24 to  
8 26. I don't want there to be any ambiguity here.

9 "While Facebook has agreed to produce some  
10 data, it resists disclosure of reports," which is saying  
11 there's [REDACTED] reports, audits we haven't talked about,  
12 "and interviews created or conducted by non-attorneys on  
13 the grounds that such documents are protected by" --

14 My question to you is: Is interviews that  
15 Judge Corely's referencing here only to third parties?

16 MS. STEIN: Is your question whether --  
17 whether there were interviews conducted of Facebook  
18 employees as opposed to developers?

19 SPECIAL MASTER GARRIE: Yeah. Or anybody else  
20 that's not, like, developers, privacy people. Facebook  
21 employees.

22 MR. SOUTHWELL: I'm understanding it to be the  
23 third-party interviews, which just to be clear, these  
24 were not like depositions with a court reporter or  
25 anything like that. So it's not like there's an

1 interview transcript.

2 SPECIAL MASTER GARRIE: It's whatever you did  
3 in connection with ADI, whether you interviewed  
4 employees, whether you interviewed only third parties.

5 All I'm saying is, is the ADI investigation  
6 include -- when she says "interviews," does that only  
7 include third -- in the ADI investigation, did you  
8 interview Facebook employees?

9 MR. SOUTHWELL: We certainly talked to lots of  
10 Facebook employees. Yes.

11 SPECIAL MASTER GARRIE: Okay. And did you  
12 make -- but the only people that were interviewing, were  
13 they lawyers, or were there any non-attorneys  
14 interviewing Facebook employees?

15 MR. SOUTHWELL: No. There were only lawyers.

16 SPECIAL MASTER GARRIE: That's what I thought.  
17 I just -- I mean, I just -- I don't want there to be --  
18 Counsel Snyder, you're muted.

19 MR. SNYDER: Let me be very clear because this  
20 is an important part of our investigation protocol.

21 To the extent Facebook employees were queried,  
22 interview is the wrong word. It's having a conversation  
23 with your client.

24 MR. SOUTHWELL: Right.

25 MR. SNYDER: It wasn't like Alex or the team



1 sat down and said, "Tell us what you did with this app."

2 If there was a question about something, there  
3 would be ongoing attorney-client communications about  
4 it.

5 And [REDACTED] and [REDACTED] were not the point of  
6 contact to have those kinds of substantive conversations  
7 with the client. Alex or one of the many lawyers on his  
8 team were the ones who did that.

9 SPECIAL MASTER GARRIE: I mean, I --

10 MR. SNYDER: There was a team of associates  
11 and partners. And when there was -- when there was a  
12 need to talk to a client, we the lawyers did that.

13 SPECIAL MASTER GARRIE: Okay. So how many  
14 interviews are we talking about, whether -- so --

15 MR. SNYDER: The word "interview" is  
16 respectfully the wrong word.

17 Alex -- I mean, it would be if someone had a  
18 question about something, they would call them up and  
19 they would get information from the client to inform  
20 Alex and his team's judgment about whether to enhance an  
21 examination, whether to make an enforcement, you know, a  
22 decision. But that's core attorney-client privileged  
23 communication. They're not interviews.

24 SPECIAL MASTER GARRIE: Let's be clear,  
25 Counsel Snyder, I'm not saying it's not core

1 attorney-client privilege. I'm just trying to --  
2 Judge Corely says this concept of interviews and audits.  
3 I get reports. And I just want to understand  
4 for purposes of my order, what are interviews? Because  
5 what I don't want to do is make more privileged  
6 discussion that isn't necessary.

7 MR. SNYDER: We didn't conduct interviews of  
8 client -- of our clients. We had ongoing discussions  
9 with our clients.

10 Alex, am I correct?

11 MR. SOUTHWELL: Yeah. I think what she's  
12 referring to is the interviews with the developers as  
13 part of the enforcement phase of the investigation.

14 MR. SNYDER: Yeah. We were only investigating  
15 third-party developers that we needed to have  
16 discussions with our clients to inform our analysis of  
17 the app developers, we did. But that was, like,  
18 conversations we were having with our in-house  
19 attorneys. They were iterative --

20 SPECIAL MASTER GARRIE: I agree with you. I  
21 just wanted to make sure there's no ambiguity here  
22 because I don't want to revisit the issue.

23 MR. SNYDER: Okay. Thank you.

24 SPECIAL MASTER GARRIE: And then with audits,  
25 what -- can you -- how many audits -- or what -- what is

1 an audit? Because the six apps that we -- exemplars we  
2 got that were provided to the -- to me as Special Master  
3 in the briefing and that were produced pursuant to  
4 Corely's order, I didn't see any audits.

5 MR. SOUTHWELL: That's right. There were no  
6 audits related to those six apps. [REDACTED]

7 [REDACTED] They  
8 generally entailed --

9 SPECIAL MASTER GARRIE: How many?

10 MR. SOUTHWELL: [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 SPECIAL MASTER GARRIE: [REDACTED]

14 MR. SOUTHWELL: [REDACTED] [REDACTED]

15 SPECIAL MASTER GARRIE: I know. But I'm just  
16 rounding up.

17 [REDACTED]

18 MR. SOUTHWELL: [REDACTED] [REDACTED] [REDACTED]

19 [REDACTED]

20 SPECIAL MASTER GARRIE: [REDACTED]

21 MR. SOUTHWELL: Yeah. [REDACTED] And

22 they generally entailed either [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

25 They took all various shapes and sizes. They

1 were all different.

2 SPECIAL MASTER GARRIE: Is an audit a formal  
3 document, I guess is what I need to -- when we say the  
4 concept of audit, how are we differentiating between  
5 audit -- everything that's not a report is an audit?  
6 I'm trying to understand. Because you have  
7 communications, you have audits, you have interviews,  
8 and you have reports.

9 MR. SNYDER: An audit is -- is a -- an  
10 interview is, "Hey, we want to ask you some questions."

11 An audit is, "We'd like to see this kind of  
12 information." And each one needs to be spoke. There's  
13 no --

14 Alex; correct?

15 I think this is right. There's no template  
16 audit. And an audit is a very broad term to refer to  
17 we want to look into certain things.

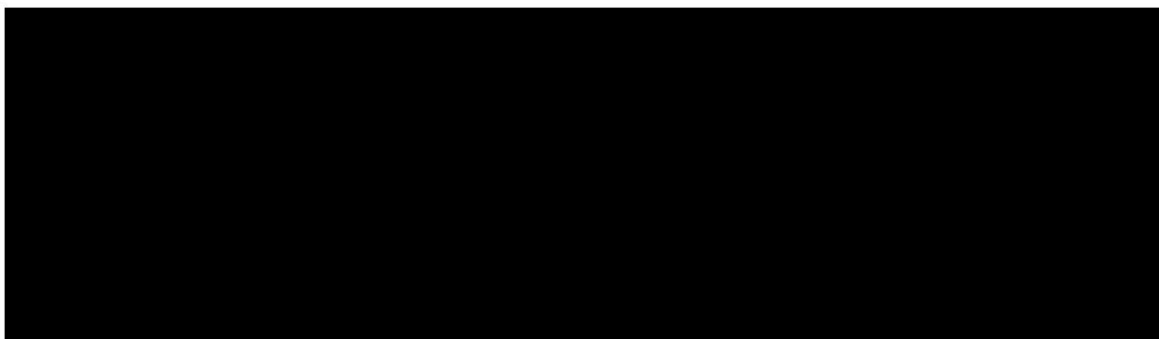
18 An RFI is a broad term to say we want this  
19 information.

20 Alex, what's the difference between an audit  
21 and an RFI?

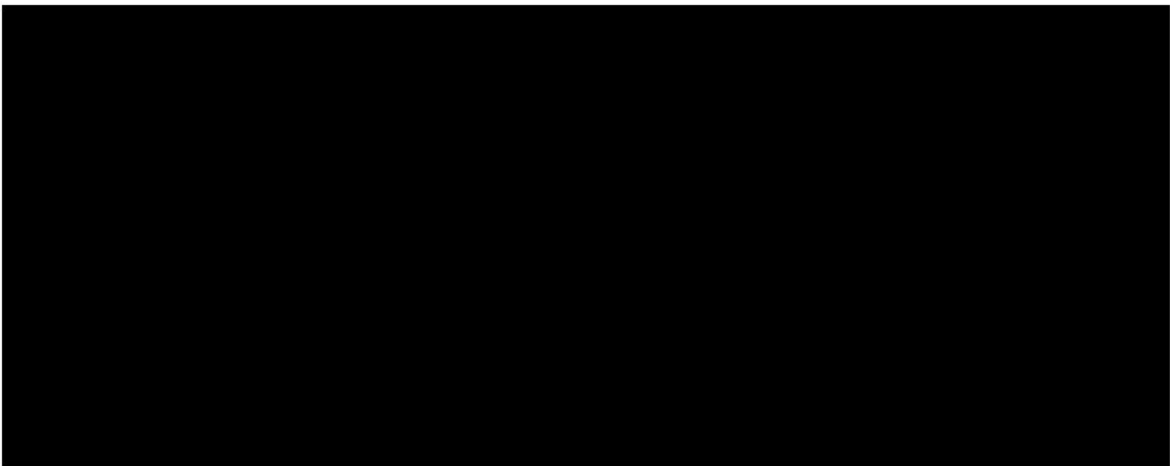
22 MR. SOUTHWELL: So an RFI is we are collecting  
23 information from the developer. [REDACTED]

24 [REDACTED]  
[REDACTED] can't understand from your app's purpose how that

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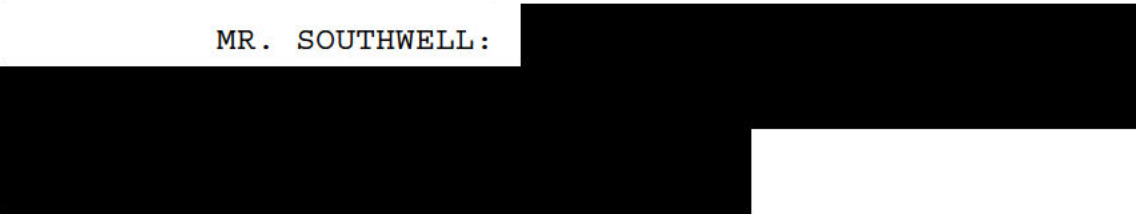
An audit, as an example, would be they -- a developer confirms that perhaps at some early stage they had information, they pulled some information by mistake, and they didn't need it, and we wanted to confirm that they had deleted it.



MR. SNYDER:



MR. SOUTHWELL:



1 MR. KO: So, Special master Garrie, can I  
2 chime in on something that was very relevant to us and  
3 why I think Judge Corely talked about audits and  
4 interviews in particular?

5 And if you would -- I'm happy to share my  
6 screen. But I'm reading from Mr. Southwell's  
7 declaration about ADI where he describes audits and  
8 interviews in connection with the ADI process.

9 SPECIAL MASTER GARRIE: You can share your  
10 screen. I read it, and I have my printed version. But  
11 you can share your screen.

12 MR. KO: So you see here, this is  
13 Southwell's -- Mr. Southwell's words, obviously not  
14 ours, but he says in the enforcement phase, "If we  
15 determine that information request response is  
16 inadequate, we may have attempted various additional  
17 methods of engagement with the developer, including  
18 conducting interviews or requesting audits of data  
19 security or storage infrastructure."

20 It sounds like you have seen that. But that  
21 is -- I mean, we're not making up the fact that they  
22 conducted interviews or, you know --

23 SPECIAL MASTER GARRIE: No, no, no. I know.  
24 I just want -- I just didn't want there to -- I read it  
25 and I fully understood it. Just for purposes of -- I

1 didn't want there to be any confusion that -- because  
2 there's been a lot of discussion about the internal  
3 communications at Facebook. I want to just draw a  
4 distinction about interview communications, that they  
5 only included interviews that Counsel Southwell  
6 specifies in his declaration as it relates to ADI.

7 Separate and apart, counsel made other  
8 inquiries. That was the purpose of my line of  
9 questioning.

10 MR. KO: Yeah. And I guess I was responding  
11 to Mr. Snyder's comment about how they don't do  
12 interviews.

13 SPECIAL MASTER GARRIE: He did interviews of  
14 third parties and Counsel Southwell did acknowledge that  
15 they did interviews of third parties.

16 My question is if they interviewed Facebook  
17 employees in connection with the construct of interviews  
18 in the ADI investigation because of the request  
19 regarding internal communications from plaintiffs  
20 previously?

21 MR. SOUTHWELL: Yeah. The reference in my  
22 declaration there was interviews with third-party  
23 developers, [REDACTED]

24 SPECIAL MASTER GARRIE: Noted.

25 Okay. So we're looking at [REDACTED] audits.

1 And then each audit has tied to an app. So there's  
2 [REDACTED] reports, [REDACTED] audits, and [REDACTED]  
3 [REDACTED] interviews that weren't conducted  
4 by attorneys [REDACTED]

5 Is that accurate, Counsel Southwell?

6 MR. SOUTHWELL: Yeah. I think I'd like to  
7 just double-check the numbers roughly but I think that  
8 sounds accurate.

9 Yes. I mean, in terms of interviews conducted  
10 by non-attorneys, [REDACTED]. In terms  
11 of audits, I think it's [REDACTED].

12 MR. SNYDER: And in terms of reports, [REDACTED]  
13 [REDACTED].

14 MR. SOUTHWELL: Right.

15 SPECIAL MASTER GARRIE: One other question I  
16 had of Counsel Kutscher Clark, can you bring up page 6?

17 MS. KUTSCHER CLARK: Page 6 of Judge Corely's  
18 order?

19 SPECIAL MASTER GARRIE: Order. Yeah.

20 MS. KUTSCHER CLARK: Okay.

21 SPECIAL MASTER GARRIE: And then I'll let  
22 Counsel Snyder, if you have any final questions or  
23 remarks, and then counsel for plaintiffs.

24 On page 6, looking at lines 9 to 15 -- more  
25 like 9 to 11, yeah, right there. "Facebook suggestion



1 that these materials may also be protected by the  
2 attorney-client privilege is unpersuasive."

3 Now, she didn't -- when she says this, she  
4 didn't actually have any of the ADI reports and makes  
5 this ruling. I just want to make sure I understood.

6 MS. KUTSCHER CLARK: Correct.

7 MR. SNYDER: Yeah. That's right.

8 SPECIAL MASTER GARRIE: "Plaintiffs are not  
9 seeking documents created by counsel, counsel's edits,  
10 or any communications with counsel."

11 MR. SNYDER: Right. And then she -- then she  
12 goes on to talk about non-attorneys interviews,  
13 non-attorneys audits. And I think that's the dividing  
14 line. And even there she acknowledges it could be  
15 attorney work product, although I think in most cases it  
16 won't be.

17 SPECIAL MASTER GARRIE: It says "Facebook has  
18 not explained how an non-attorney's interview or audit  
19 of a developer would be protected from discovery by the  
20 attorney-client privilege under federal law. At best,  
21 such material would be attorney work product. For the  
22 reasons explained above, it's not under" -- "it is not  
23 under the totality of the circumstances here given  
24 Facebook's business"...

25 Okay. All right. So then -- and that's what

1 your -- where your -- the argument you made,  
2 Counsel Snyder, or part of that argument was looking at  
3 that; right?

4 MR. SNYDER: That, and informed by the judge's  
5 comments in the hearing where she said that "A lot of it  
6 I don't think is relevant at all," and then she said,  
7 "Some of the materials are," quote, "privileged." And  
8 then again she said that "The facts underlying ADI may  
9 be privileged," and then she said, quote,  
10 "attorney-client privilege or attorney client's work  
11 product," you know, "including edits from attorneys and  
12 advice."

13 So what the judge is saying is because the  
14 plaintiffs said "We're not looking for attorneys'  
15 communications," that gave the judge the ability to make  
16 the ruling that she did, which is non-attorney reports,  
17 non-attorney audits, and non-attorney interviews. And  
18 so that's the framework that she -- she's created.

19 And just frankly, I don't think --

20 Alex, correct me if I'm wrong.

21 -- that many, if any, of the materials will be  
22 work product. I mean, some might, to the extent that [REDACTED]

23 [REDACTED]

24 [REDACTED] and there may be some, you know, that are  
25 work product but --

1           SPECIAL MASTER GARRIE: But the reports  
2 themselves would still be responsive?

3           MR. SNYDER: Responsive, but -- you know, but  
4 to the extent there's, you know, planning for  
5 litigation, there might be a work product privilege  
6 there, but...

7           SPECIAL MASTER GARRIE: You only used five or  
8 six out of the --

9           MR. SNYDER: Yeah. That's fine. Exactly.

10          MS. STEIN: Right.

11                 And just to be clear, I mean, obviously our  
12 view litigated to Judge Corely is that these materials  
13 were categorically work product.

14                 What Mr. Snyder is referring to is when we do  
15 our individual review, we're looking for individual  
16 concerns about privilege or work product in the  
17 document-by-document basis, not sort of the more global  
18 work product issue from these materials being prepared  
19 at the direction of counsel.

20          MR. SNYDER: Right.

21                 That's been resolved by Judge Corely and under  
22 compulsion, you know, we're going to produce, you know,  
23 whatever is the ultimate order on this non-attorney  
24 report audit interview rubric.

25          SPECIAL MASTER GARRIE: All right.

1 Counsel Snyder, actually, I have a question -- two other  
2 questions.

3 In plaintiffs' brief, you reference these 99  
4 documents that were on the privilege log that are being  
5 withheld for privilege.

6 And then I -- you've provided me the  
7 spreadsheets --

8 MR. SNYDER: Yes.

9 SPECIAL MASTER GARRIE: -- five spreadsheets.

10 Counsel for plaintiffs, do you know -- I think  
11 you uploaded them; correct?

12 MR. KO: Yeah. That's correct. Six.

13 SPECIAL MASTER GARRIE: Six. Sorry.

14 MR. KO: Spreadsheets.

15 SPECIAL MASTER GARRIE: I only looked at the  
16 five I got, only five of the six that I looked at.

17 Can you bring up one of the spreadsheets? Any  
18 one of them would be fine. And just explain to me  
19 your -- the issue and the argument a little further?

20 MR. KO: Sure. I'm happy to.

21 I don't know -- I think you were intending to  
22 address that question to plaintiffs and not Orin but I  
23 could be --

24 SPECIAL MASTER GARRIE: Yeah, to plaintiffs.

25 Sorry. It's to plaintiffs. You're the ones who

1 discussed it.

2 MR. KO: Right.

3 Let me bring up the privilege log.

4 The simple point was this: Because  
5 Judge Corely had indicated that all reports needed to be  
6 produced, and they had said -- and they -- Facebook had  
7 produced six reports, we weren't -- this is a very  
8 simple issue. We weren't sure if they complied with the  
9 order or whether or not more reports needed to be  
10 produced. Because based on a review of the privilege  
11 log, there were references to additional reports.

12 SPECIAL MASTER GARRIE: Can you bring up --  
13 can you -- yeah. So I looked at the privilege log. Can  
14 you bring that up? Because I just want to understand --  
15 so you highlight them in yellow, which by the way, thank  
16 you, when sorting by Excel makes it a lot faster.

17 MR. KO: Right.

18 SPECIAL MASTER GARRIE: So you want to walk  
19 through one of them, just so I understand?

20 MR. KO: Sure.

21 So here's entry row 560 in which the  
22 description is given that there is a report conveying  
23 legal advice and that it relates to findings with  
24 counsel and an investigation was conducted in  
25 anticipation of and in response to litigation and

1 regulatory inquiries in order to address legal and  
2 compliance risk.

3 I mean, that's a pretty general boilerplate  
4 description. But there's a report there. So the simple  
5 point is that if the order was compelling all background  
6 and technical reports, as described in Mr. Southwell's  
7 declaration, we are not sure and what we cannot tell  
8 based on these privilege logs that Facebook created and  
9 provided whether or not we got all the reports. Because  
10 there's a difference between the six background reports  
11 that we got and other reports that are described in the  
12 privilege log --

13 MR. SNYDER: I can address that.

14 MR. KO: -- of which there were 99 that we  
15 counted.

16 MR. SNYDER: That's really -- that's an easy  
17 one.

18 So the order directed us to produce background  
19 technical reports prepared by non-attorneys to the  
20 extent that Alex Southwell wrote a report. So, quote,  
21 unquote, that's really a -- that's just another word for  
22 an attorney-client privileged legal communication that  
23 was sent by Alex or between -- to the client.

24 It's not a report in the sense of the order,  
25 which is background and technical reports prepared by

1 non-attorneys. This entry says that it falls outside  
2 the order because it says that it was prepared by  
3 Gibson Dunn.

4 And then relatedly, you know, plaintiffs  
5 challenge now all entries on privilege logs that don't  
6 include the name of an attorney, 400 of more than 6,000  
7 entries.

8 You know, Judge Corely allowed the plaintiffs  
9 to choose 20 privilege log entries for a review.

10 They submitted -- we submitted simultaneous  
11 briefing. And she did an in-camera review of the log  
12 documents, and -- you know, and didn't order us to  
13 produce a single one.

14 So I think that -- I think that there's --  
15 there should be no concern that we have not complied  
16 with the order.

17 And to the extent we called reports  
18 Gibson Dunn documents or communications to the client,  
19 we obviously didn't produce those.

20 But that's, you know, core attorney-client  
21 communications, not the underlying facts, which is what  
22 plaintiffs have said they wanted, but the legal advice  
23 given by Gibson Dunn to the client.

24 MR. KO: Well, what's interesting about that,  
25 Special Master Garrie, is that, again, the description

1 is fairly boilerplate, as you've seen.

2 We can't even tell -- like, with respect to  
3 these six apps -- or six memoranda, which they construed  
4 clearly as either a background or technical report,  
5 because obviously Judge Corely -- since she didn't see  
6 the memoranda, she didn't say that they had to produce  
7 that specific memoranda.

8 What she did is she said, "Please produce the  
9 background and technical reports as described in  
10 Mr. Southwell's declaration."

11 We're not even sure whether or not these six  
12 memoranda were actually logged on their 6,000 whatever,  
13 and their six -- you know, six exemplar apps. Because  
14 it's not like they said in their description that this  
15 is an [REDACTED] there's an [REDACTED] memo or a [REDACTED] memo  
16 summarizing all the findings based on the audits and the  
17 interviews that they conducted in the written memoranda  
18 internally and the interviews that were done; right?

19 They just have general references to reports.

20 So we don't know -- it's just a simple -- it's  
21 a simple ask to them. Mr. Southwell says, "We've  
22 created all these background and technical reports. We  
23 created all these other written memoranda."

24 And then you compare that and contrast that  
25 with their privilege logs, which simply state here's a



1 report and then the, you know, general boilerplate  
2 language contains legal advice is protected, blah, blah,  
3 blah.

4 But clearly, we -- there's no articulate --  
5 there's no clear basis or clear identification of these  
6 six memoranda.

7 So it does raise an interesting point that  
8 Orin is suggesting that everything was on there and this  
9 is -- there's some sort of difference between the two.

10 I can't really tell based on the descriptions.

11 MR. LOESER: It seemed like a simple ask and  
12 simple answer. Are these reports that were produced on  
13 the log?

14 MR. SNYDER: I'm not sure what counsel is  
15 asking.

16 These are privilege logs from the sampling  
17 exercise, not to the -- it is nothing generic about a  
18 description that says legal advice from Gibson Dunn --  
19 that's legal advice from Gibson Dunn.

20 Those were not produced and are not within the  
21 order.

22 Why doesn't -- Martie, why don't you amplify  
23 and answer that question.

24 MS. KUTSCHER CLARK: Yeah.

25 I -- so these privilege logs were about

1 something completely different. And the way they were  
2 prepared was very different than what we're now talking  
3 about.

4 The parties had agreed to these six exemplar  
5 apps. We agreed to a set of 26 custodians. We then  
6 collected from those 26 custodians any document hitting  
7 on the name of the app, the app ID that related in any  
8 way to ADI. We logged all of those communications and  
9 any attachments to those communications.

10 So, yes, there were some documents attached to  
11 those communications that got labeled on a privilege log  
12 as a report, but that's something very different than  
13 these background and technical reports that were  
14 prepared by the consulting experts at [REDACTED] and [REDACTED].

15 And that's what Mr. Southwell was referring to  
16 in his declaration to Judge Corely. Because after we  
17 had done this whole logging exercise, plaintiffs said  
18 that's what they were seeking. They said they wanted  
19 the reports prepared by the outside experts. And  
20 Mr. Southwell submitted a declaration about those  
21 reports.

22 But that's -- it's just a completely different  
23 thing than what we were logging at the time.

24 MS. STEIN: Yes. And I think that Mr. Ko had  
25 put language on the screen earlier that said that

1 Judge Corely recognized that the background and  
2 technical reports were not part of the logging exercise.

3 MR. LOESER: Well, we didn't have any ability  
4 to identify from the -- we wouldn't know.

5 But I guess the question I have -- yeah. The  
6 question for you, Special Master Garrie, and a question  
7 for Facebook is are the reports logged? I mean, are  
8 they logged or not?

9 SPECIAL MASTER GARRIE: Well, one second.

10 You will -- good news -- get a log of all the  
11 reports in some fashion or another.

12 So when they say -- when you say logged, they  
13 haven't produced them yet; right? So I don't know where  
14 they would be logged. Maybe I'm not understanding.

15 Have these reports -- these reports haven't  
16 been produced. Is that --

17 MR. LOESER: They have a privilege log. This  
18 is kind of the point, there's this privilege log --

19 SPECIAL MASTER GARRIE: Okay. Wait. So now  
20 we're going to the privilege --

21 MR. LOESER: Well, it's -- well, maybe we  
22 don't need to go there. It's just that this is sort of  
23 part of the confusion from what Orin just said, which  
24 is, you know, there were these 99 -- in the logs we sent  
25 you, there are 99 that relate to reports. And we have

1 no idea if that includes any of these [REDACTED] or [REDACTED]  
2 memos.

3 Maybe Facebook can just tell us. It seems  
4 like an easy question.

5 MS. STEIN: Well, as Mr. Garrie -- as  
6 Special Master Garrie orders us to produce additional  
7 background and technical reports, we're going to do  
8 that. We produced the ones for the six exemplar apps.

9 I'm really not sure what the issue is. We'll  
10 comply with whatever.

11 MR. LOESER: The issue is we heard a lot of  
12 argument --

13 SPECIAL MASTER GARRIE: Counsel, one second.

14 I just need to think about everything that was  
15 just said, and then I will determine who's going to  
16 talk. Just give me 30 seconds to think about it all.

17 Okay. I have a question, and then I'll let --  
18 Martie, you can respond -- or Counsel Stein.  
19 Sorry.

20 On the privilege -- my question I guess for --  
21 the privilege logs that you're referring to, plaintiffs,  
22 who -- where do they -- what is their origin? It's  
23 related to the six exemplar app exercise; right?

24 MR. KO: Correct.

25 So their origin is when we were trying to

1 litigate this issue in the summer of 2020 and we wanted  
2 an order from Judge Corely saying that, "No. Facebook  
3 is not entitled to a categorical privilege," she said,  
4 "I need some context. I need to rule based on some --  
5 either some documents or a privilege log based on those  
6 documents."

7 Therefore, setting in motion this  
8 identification of six apps, 25 custodians, as Martie  
9 correctly identified, and a production in December of  
10 last year of these six exemplar privilege logs.

11 The point that we are trying to make is --

12 SPECIAL MASTER GARRIE: I get it. I get it.

13 Let me ask my next question.

14 So then when there's a report being referenced  
15 in this privilege log, it's not -- when it says the  
16 Gibson Dunn report -- or what is the exact words? If  
17 you bring it up, I can read it to you but...

18 Actually, I have it up on my screen. Give me  
19 a second.

20 Where it says [REDACTED]

21 [REDACTED]  
22 [REDACTED]

23 [REDACTED] blah, blah, blah, your question that you're  
24 asking is does this include -- are they referring to the  
25 [REDACTED] reports when they say "report"?

1 Is that your question, plaintiffs?

2 MR. KO: It's a little broader than that  
3 because are these reports -- what are these reports and  
4 do they include the [REDACTED] and [REDACTED] reports?

5 SPECIAL MASTER GARRIE: Well, that's two parts  
6 of the question.

7 So your first question is what are these  
8 reports?

9 And I believe Counsel Snyder said there are  
10 reports that Gibson Dunn wrote in connection with  
11 providing legal process.

12 Your second question is are these -- are  
13 these -- do these, when you cite these reports, also  
14 reference [REDACTED] and [REDACTED] reports?

15 Is that right then?

16 MR. KO: Correct.

17 Do they include the background and technical  
18 reports, including the [REDACTED] and [REDACTED] memoranda that were  
19 produced and ordered by Judge Corely?

20 MR. SNYDER: You know, we probably shouldn't  
21 call them reports. I mean, they're attorney-client  
22 communications, giving legal advice to the client about  
23 what action, if any, to take with respect to an app.

24 So call them reports, call them legal  
25 communications. You know, the fact that they're called

1 reports shouldn't be overinterpreted --

2 SPECIAL MASTER GARRIE: Let me -- I think  
3 that's the source of confusion.

4 MR. SNYDER: Yeah.

5 I -- you know, we should have written -- and  
6 I'm sure -- we don't really write reports to clients as  
7 a law firm. We write e-mails and sometimes memos. I  
8 never heard, you know, of a report necessarily. Maybe  
9 you make a report to a board sometimes.

10 But, Alex, correct me if I'm wrong, that's a  
11 very loose word to describe what might be an e-mail or  
12 an oral communication to a client about, "Hey, what are  
13 we going to do with this app?"

14 Is that correct?

15 MR. SOUTHWELL: Yeah. That's right. I mean,  
16 I'd have to go back and look at what these are.

17 I mean, also, I think timingwise, didn't this  
18 log come before the background and technical reports  
19 were produced?

20 MS. KUTSCHER CLARK: Yes. Yes.

21 MR. SOUTHWELL: Yeah.

22 I mean, look, there were one -- there is  
23 essentially one technical background investigation  
24 report for this app [REDACTED], and it was produced.  
25 Plaintiffs have it. So whether it was previously on a

1 log, I don't know. But they have -- they have that  
2 report.

3 MS. WEAVER: So when it says [REDACTED]  
4 [REDACTED] in line 269 there, what  
5 is that? That does sound like a formal report system  
6 that does not say privilege.

7 MR. SOUTHWELL: I have no idea what that means  
8 sitting here today.

9 MS. WEAVER: So that doesn't look just like an  
10 e-mail and it doesn't sound privileged because it would  
11 otherwise have said "attorney-client communication."

12 MR. SOUTHWELL: This is --

13 SPECIAL MASTER GARRIE: Wait, wait, wait.

14 MR. SOUTHWELL: -- a document part of a  
15 family. It's part of a family. So you have to see the  
16 whole family.

17 MS. STEIN: I mean, this seems like a huge  
18 frolic and detour given plaintiffs repeatedly saying  
19 that they weren't seeking Gibson Dunn's advice to  
20 clients. This is all supposed to be about  
21 non-Gibson Dunn advice and work product. So, you know,  
22 this seems like a --

23 MS. KUTSCHER CLARK: Yeah.

24 And the context here is really important. I  
25 mean, again, the way these logs were prepared was we



1 gathered virtually any e-mail from 26 custodians that  
2 hit on an app's name, and then we logged all of those  
3 e-mails and any attachments to them.

4 So, sure, we logged things that were described  
5 as reports. Maybe in some instances report wasn't the  
6 most apt term that should have been used. Sitting here,  
7 I don't know every single one of them is.

8 But, you know, these were random attachments  
9 in a lot of these instances to privileged e-mails, and  
10 they're a very different thing than the reports we're  
11 talking about at this point and that we wound up  
12 producing a year later.

13 We would need to look at every single one of  
14 them to know exactly what every single one of them was,  
15 but they're not what we're talking about at this point.

16 SPECIAL MASTER GARRIE: May I be so bold to  
17 suggest that we avoid using the word "report" in a  
18 privilege log on a going-forward basis and use if it's  
19 a memo to file, if it's an e-mail, if it's whatever.  
20 Because the word report, interview, and audit all have  
21 very distinct meanings at this point of the litigation  
22 that mean different things and --

23 But with that said, Counsel Loeser, what were  
24 you going to say?

25 MR. LOESER: Yeah. I think just one point on

1 this and then maybe can steer ourselves back to the  
2 September 8th order, which is really I think what should  
3 be guiding us here.

4 And that is this log is created at a time when  
5 Facebook was asserting a work product and  
6 attorney-client privilege, which Judge Corely has  
7 rejected.

8 And so just a final, you know, parting thought  
9 on this log, it needs to be updated to reflect the  
10 Court's order and the guidance provided.

11 So if there are things on their log that they  
12 previously asserted were privileged or subject to work  
13 product at a time before there was a ruling on that, now  
14 there's a ruling, so, you know, Facebook needs to go  
15 back and look, and if they need to update their log to  
16 reflect that ruling, then they should.

17 And while they're doing that, maybe they want  
18 to take out the word "report."

19 MS. STEIN: Can I respond to that,  
20 Special Master Garrie?

21 SPECIAL MASTER GARRIE: One response, and then  
22 we're going to return back to what we're here to cover.

23 MS. STEIN: Yeah.

24 The response is that Judge Corely adjudicated  
25 that privilege log and didn't order us to produce

1 anything from the privilege log. So from our  
2 perspective, what's on the privilege log stays in the  
3 privilege log. And that's all I'll say.

4 SPECIAL MASTER GARRIE: If you're going to  
5 produce -- time out, Counsel. Sorry, Counsel. Just one  
6 second.

7 If you produce a document that you previously  
8 designated as privilege and you keep it on your  
9 privilege log, are you going to update your privilege  
10 log to reflect the fact that you produced the document?

11 MS. STEIN: Whatever -- we will --  
12 Special Master Garrie, we will follow -- we have a very  
13 elaborate privilege log protocol, and I will certainly  
14 not profess to know the ins and outs of that but, you  
15 know, we will --

16 SPECIAL MASTER GARRIE: I mean, in your  
17 privilege log protocol, there's this whole process that  
18 you have mapped out to address this very situation.

19 MS. STEIN: Correct. So we will --

20 SPECIAL MASTER GARRIE: In actually  
21 excruciating detail.

22 MS. STEIN: Excruciating detail.

23 SPECIAL MASTER GARRIE: So I think  
24 Counsel Loeser's point was that just to make sure --  
25 reminding everybody, because he's doing his job as a

1 team player, that the privilege protocol exists and it's  
2 necessary all parties continue to follow what they  
3 committed to early on.

4 With that said, we're going to revert back.

5 I would highly encourage the parties to do  
6 their best to resolve all privilege disputes in whatever  
7 way humanly possible.

8 With that said, I will -- I will issue an  
9 order accordingly, but before I do, I think --

10 Who's sharing, just so I'm on the --

11 MR. LOESER: We're sharing the order,  
12 Your Honor, because we're hoping to have a minute to  
13 just go back to it when you're done with your comments.

14 SPECIAL MASTER GARRIE: No, no. I was just --  
15 perfect.

16 But Counsel Snyder is going to --

17 Do you have any comments? If you wouldn't  
18 mind stop sharing and then you're welcome to your  
19 closing comments, and then I will issue -- I will take  
20 the hearing, look at the transcript, and then issue --

21 MR. SNYDER: You're asking me to go first?

22 SPECIAL MASTER GARRIE: Yes, sir.

23 MR. SNYDER: Okay.

24 SPECIAL MASTER GARRIE: Unless you want to go  
25 last because --

1 MR. SNYDER: No. I have -- I have another  
2 call because I thought we were ending at 3:00 so I  
3 apologize. I have a board meeting at -- in five  
4 minutes.

5 So, look, I think I've said everything that  
6 needs to be said. I think the plaintiffs have made  
7 clear they want the underlying facts.

8 We think the order is clear that what that  
9 means is non-attorney audits, reports, and interviews.  
10 And if you order us to produce some or all of those,  
11 they're going to have their underlying facts.

12 We clearly think that the judge has excluded  
13 from her order the millions and millions and millions of  
14 pages of so-called underlying communications; that that  
15 would be not only overkill but, like, trying to kill an  
16 ant with a -- with a -- you know, an elephant.

17 I think that some kind of -- we don't think  
18 all the reports necessarily should be ordered. If  
19 you're inclined to have us produce reports, we think a  
20 smaller number, but at a bare minimum, a rolling  
21 production, you know, where we are able to produce in  
22 iterative fashion. Because there's going to need to be  
23 I privilege log, and hopefully the privilege log will be  
24 not as onerous because there's not a lot of privileged  
25 material in there. But until we dig into the reports,

1 we're not going to know that.

2 So, you know, if we're going to be ordered to  
3 produce more materials, you know, we would first say  
4 all the reports aren't necessary, but if you think all  
5 the reports are necessary, we should maybe produce [REDACTED]  
6 in the first instance. Plaintiffs can look at them and  
7 see whether, you know, there's anything in there that  
8 leads them to believe that producing every single one  
9 is -- is necessary. And we can -- we can reconvene at  
10 that point. Maybe we can give you 10 -- a sample of 10  
11 of them randomly, and you can look at them. I think you  
12 you'll see pretty quickly that, again, this is a dry  
13 well and doesn't justify, you know, extending discovery  
14 deadlines or imposing the burden and cost of reviewing  
15 every single one of them.

16 So Martie, Deb, anything else that you want to  
17 add to that?

18 MS. STEIN: No. Not from me.

19 MS. KUTSCHER CLARK: No. Thanks.

20 SPECIAL MASTER GARRIE: Counsel for  
21 plaintiffs, whenever you're ready.

22 MR. LOESER: Thank you, Special Master Garrie,  
23 and thank you again for devoting your Saturday to this  
24 joyful topic.

25 We're going to screen the order.

1 I do want to again just reiterate -- and I  
2 know you're thorough in reading all of the records, and  
3 I really encourage you to read the transcripts and the  
4 discussion of the logging exercise.

5 It's a fiction to suggest that the logging  
6 exercise resulted in Judge Corely ruling based on the  
7 logs that internal communications are not available.

8 The logging exercise was ultimately not  
9 helpful because the communications covered by the logs  
10 were not substantive.

11 And so the judge moved on to another approach  
12 to dealing with this issue, which was the briefing  
13 resulting in the September 8th order.

14 I think that -- that would be really  
15 abundantly clear to you if you look at the transcripts  
16 and just follow through how that conversation went.

17 But if you look at the order itself at page 2,  
18 there are two issues -- two legal arguments addressed by  
19 the order.

20 The first is work product. And so if you go  
21 to page 2 of the last paragraph before "Analysis," what  
22 she writes is "Plaintiffs seek material from the second  
23 and third phases that does not involve communications  
24 with lawyers or content created by lawyers. While  
25 Facebook has agreed to produce some information, it

1 refuses on privilege grounds to produce the reports,  
2 audits, and interviews, and non-attorney communications  
3 related to the same."

4 So that's what was before the Court.

5 And on the work product issue, if you go to  
6 the following page -- or I'm sorry. If you go to  
7 page 5, at the bottom of the page, she concludes her  
8 discussion of work product. And here's what she says,  
9 at the bottom of the page:

10 "It is inconceivable that Facebook would not  
11 have initiated a speedy, large scale subject matter  
12 specialist investigation into app data misuse in the  
13 absence of potential litigation. Such assertion could  
14 only be true if the Court found that Facebook was lying  
15 to the public when it stated that the purpose of the ADI  
16 was to root out bad apps and secure Facebook's platform  
17 so that consumers could have faith in the company.

18 "Facebook unsurprisingly does not offer any  
19 evidence to support such a finding."

20 That's the conclusion of the work product  
21 discussion which concerned those communications that we  
22 identified up above.

23 They include internal communications.

24 Then the next argument Facebook made was an  
25 attorney-client privilege argument. And she addressed



1     that with regard to the particular documents that were  
2     relevant to that discussion and to Facebook's argument.  
3     And she concludes that the attorney-client privilege  
4     doesn't apply to the -- to the non-attorney interview or  
5     audit of developer and that information.

6             That is the conclusion of the attorney-client  
7     issue. It resolves the question of the documents for  
8     which Facebook was asserting attorney-client.

9             Facebook was not asserting an attorney-client  
10    privilege to internal nonlawyer communications. There  
11    was never -- there's not even any conceivable or  
12    credible basis for that.

13            And so then when you get to the end, you have  
14    these two rulings: One on work product, one on  
15    privilege. And she orders a production of documents.  
16    And if you go down to the conclusion, she orders the  
17    production of these -- the particular reports that we've  
18    spent a lot of time going through, and then has this  
19    language about additional materials consistent with the  
20    guidance.

21            That guidance covers everything that  
22    plaintiffs were seeking, that includes internal  
23    communications.

24            There's not a word in this order that says  
25    we're not entitled to those communications.

1           And it would be bizarre in modern day  
2     litigation to infer from the absence of any discussion  
3     ruling it out that we're not entitled to this  
4     information that Facebook doesn't even argue is  
5     privileged because it can't possibly be, and is  
6     discussed in the work product discussion and found not  
7     to be protected by work product.

8           So when we're done with all of this, you step  
9     back and you look at what is Facebook saying?

10          Okay. They're not really saying, we don't get  
11     these memos because they know that we do because they've  
12     already produced them.

13          As far as the audit report and background  
14     information, you know, we spent enough time on that.  
15     It's obviously consistent with her guidance because she  
16     describes it, so it's discoverable.

17          And then you get to the internal  
18     communications. And all they're saying about that is  
19     they infer from the absence of any discussion that this  
20     critical piece of discovery, the only information we  
21     would have in which Facebook itself discusses these  
22     critical investigative reports is somehow not there by  
23     some inference.

24          And, again, I encourage you to read the  
25     process that we went through to get to this order, and

1 to look at the discussion in the transcripts. You will  
2 see that that inference that Facebook has created is  
3 wrong. It's not supported by the record. And it's  
4 clearly not supported by the Federal Rules of Evidence.

5 So those are my remarks. I really appreciate  
6 this time and this effort, Your Honor. I think that  
7 clearly the parties have had full opportunity to explore  
8 these issues with you now, and if you have any other  
9 questions, I'm sure we'll stay here all day to answer  
10 them.

11 SPECIAL MASTER GARRIE: Good news, no more  
12 questions.

13 MS. WEAVER: I'd like to make one more comment  
14 as well, just in light of some of the arguments that  
15 Mr. Snyder made today.

16 We made this argument in front of  
17 Judge Corely. We haven't made it to you.

18 To the extent that Facebook at any point in  
19 time is going to raise as a defense that it thoroughly  
20 conducted an investigation and as a shield to a  
21 negligence claim, then this entire year's long exercise  
22 of assertion of privilege will have been in vain  
23 because, of course, they cannot use the investigation  
24 as a sword and a shield.

25 And Judge Corely expressly acknowledged that

1 in the hearing.

2 So we are all here today to figure out how to  
3 parse their assertions of privilege. But they should  
4 not be coming back on the merits ever saying that this  
5 is a dry well or that they conducted a thorough  
6 investigation, et cetera.

7 SPECIAL MASTER GARRIE: Well, the good news is  
8 that -- wait, wait, wait. Time out.

9 The good news is that's for Judge Corely and  
10 Judge Chhabria to figure out and not me, so I will note  
11 that for the record. Far beyond my pay grade. And I  
12 will let them figure -- I will let Judge Corely and  
13 Judge Chhabria resolve that issue.

14 I thank everybody for your time. This was  
15 very informative and helpful for me.

16 Does the court reporter need any --  
17 We'll go off the record.

18 MR. SNYDER: I just need to reserve rights on  
19 that issue, which I've done.

20 SPECIAL MASTER GARRIE: Yeah, yeah. Let's go  
21 back -- back on the record.

22 Go ahead, Counsel Snyder.

23 MR. SNYDER: I'll just reserve all of our  
24 rights to Ms. Weaver's comments, and we can agree to  
25 disagree.

1 SPECIAL MASTER GARRIE: Sounds great.

2 As I said before, not before me as  
3 Special Master. And I'll leave it to Judge Chhabria  
4 and Judge Corely to -- if that becomes -- for them to  
5 deal with.

6 We will go off the record.

7 Court Reporter, do we have everything?

8 (Discussion held off the record.)

9 SPECIAL MASTER GARRIE: Well, when you get it  
10 to the parties --

11 Could one of the parties just send me a copy  
12 of the rough when you guys get it?

13 MS. WEAVER: Yes. Absolutely.

14 (Whereupon, proceedings adjourned at 12:10 p.m.)

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1 STATE OF CALIFORNIA )  
 )  
2 COUNTY OF YOLO )

3 ---o0o---

4 I, Katy E. Schmidt, a Certified Shorthand  
5 Reporter, do hereby certify:

6 That said proceedings were taken before me at  
7 the time and place therein set forth and were taken down  
8 by me in shorthand and thereafter transcribed into  
9 typewriting under my direction and supervision;

10 I further certify that I am neither counsel  
11 for, nor related to, any party to said proceedings, and  
12 am not in any way interested in the outcome thereof.

13 In witness whereof, I have hereunto subscribed  
14 my name.

15 Dated: December 8, 2021

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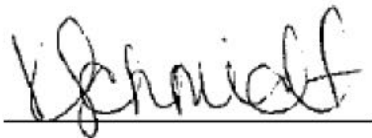
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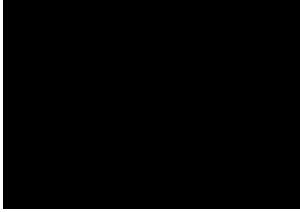


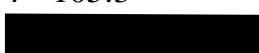
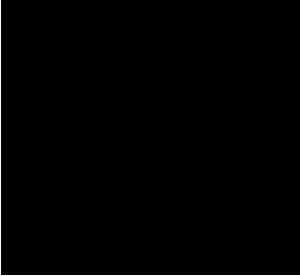
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**[app - audit]**

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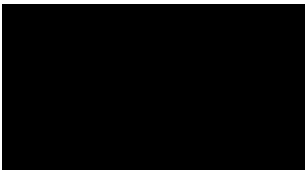
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**[court - developed]**

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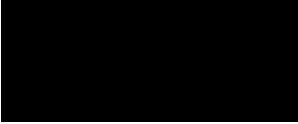



**[factual - further]**

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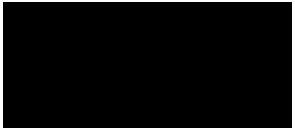
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**[litigate - managing]**

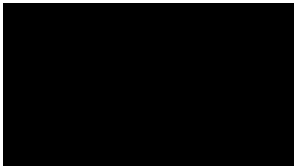
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**[o0o - overkill]**

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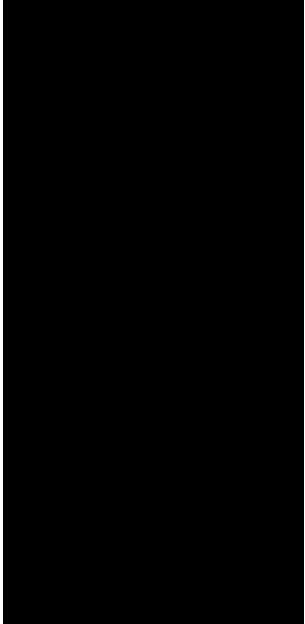
**[sampled - sides]**

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[u0400 - we've]

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